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No.

In the Supreme Court
OF THE
United States

OCTOBER TERM, 1986

CHARLES F. FOGERTY, et al.,
Petitioner,

v.

STATE OF CALIFORNIA, et al.,
Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE COURT OF APPEAL OF THE STATE OF CALIFORNIA FOR THE THIRD APPELLATE DISTRICT

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QUESTIONS PRESENTED

1. Whether state judicial decisions that abruptly change existing law, retrospectively burdening the privately owned shores of a navigable lake with a pervasive "public trust" easement, violate due process by effectively taking property without compensation.

2. Whether those decisions work a further unconstitutional taking and violate due process guarantees insofar as they extend the public trust easement landward beyond the natural high watermark of the bed of a navigable lake, to an artificially high level resulting from the construction and operation of a dam at the lake outlet by unrelated third parties.

PARTIES BELOW

The appellants below (and original plaintiffs) were the present petitioners: Charles F. Fogerty, Stella Fogerty, Russell S. Grove, Harold R. Ebright, Jr., Katherine F. Ebright, George Hilton Edmondson, Janet Louise Edmondson, Laurence L. Lindsey, Rosemary F. Lindsey, Homer M. Hayward, Reid W. Dennis, Tahoe Meadows, a California corporation, and Tahoe Shorezone Representation, a Nevada Corporation. Respondents below, in addition to the State of California, were the State Lands Commission of the State of California and the Department of Fish and Game of the State of California.

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Charles F. Fogerty, Stella Fogerty, Russell S. Grove, Harold R. Ebright, Jr., Katherine F. Ebright, George Hilton Edmondson, Janet Louise Edmondson, Laurence L. Lindsey, Rosemary F. Lindsey, Homer M. Hayward, Reid W. Dennis, and Tahoe Meadows, a California corporation, petition this Court to issue a writ of certiorari to review the decision of the Court of Appeal of the State of California for the Third Appellate District in this case.

OPINIONS BELOW

The opinion of the California Court of Appeal (*Appendix A* attached hereto) is reported at 231 Cal. Rptr. 810 (1986). The opinion of the Superior Court for Placer County (*Appendix B* attached hereto) is not reported. The opinion of the California Supreme Court on a previous appeal of the case (*Appendix C* attached hereto) is reported at 29 Cal. 3d 240 (1981) and 625 P.2d 256. The opinion of the California Supreme Court in the

companion case entitled *State v. Superior Court (Lyon)* (*Appendix D* attached hereto) is reported at 29 Cal. 3d 210 (1981) and 625 P.2d 239. This Court's order denying petitions for writs of certiorari to review these decisions is reported at 454 U.S. 865 (1981).

JURISDICTION

The judgment of the California Court of Appeal (*Appendix A* attached hereto) was entered on November 24, 1986. A timely petition for review to the Supreme Court of California was denied on March 4, 1987 (*Appendix E* attached hereto). The appellate court's judgment became final on March 11, 1987 (*Appendix F* attached hereto) and was affirmed as modified by the Superior Court of Placer County on May 6, 1987 (*Appendix G* attached hereto).

This Court's jurisdiction is invoked under section 1257(3) of Title 28 of the United States Code. The federal law contentions now presented were raised in the court below and there rejected. *See* App. A at A-7 to A-9 and n.5. They were likewise tendered to the California Supreme Court by a petition for review, which was denied without opinion. App. E, *infra*. Consideration of these questions is in no way foreclosed because they were presented to the California Supreme Court on the previous appeal and implicitly rejected there (*see* App. D at A-61 to A-63), or because this Court denied certiorari to review that earlier judgment. *E.g., Mercer v. Theriot*, 377 U.S. 152, 153-154 (1964); *Hathorn v. Lovorn*, 457 U.S. 255, 261-262 (1982). *See* Stern, Gressman & Shapiro, *Supreme Court Practice*, at 41, 132, 316 (4th ed. 1986). At this point, it is clear the decision below is "final" for all relevant purposes, no issue remaining in the State courts. *See* App. A at A-17.

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

1. The Just Compensation Clause of the Fifth Amendment to the United States Constitution provides:

> [N]or shall private property be taken for public use, without just compensation.

2. The Due Process Clause of the Fourteenth Amendment to the United States Constitution provides:

> [N]or shall any State deprive any person of life, liberty or property, without due process of law; . . .

3. Section 830 of the California Civil Code provides:

> Except where the grant under which the land is held indicates a different intent, the owner of the upland, when it borders on tide-water, takes to ordinary high-water mark; when it borders upon a navigable lake or stream, where there is no tide, the owner takes to the edge of the lake or stream at low-water mark; when it borders upon any other water, the owner takes to the middle of the lake or stream.

STATEMENT

1. At the center of this controversy is California's largest lake, Lake Tahoe, which covers approximately 120,000 acres and lies on the common boundary between California and Nevada in the Sierra Nevada Mountains. *See California v. Nevada*, 447 U.S. 125 (1980). The lake is fed by melting snows from the Sierras and has one outlet—the Truckee River—that flows to the north and east through California into Nevada, ultimately emptying into Pyramid Lake. When California became a state in 1850 and until the early 1870's, Lake Tahoe was in its natural condition. Although in unusually dry years the level might fall lower, the ordinary low waterline then was (and, but for artificial regulation, would be today) at the rim of the natural outlet of the lake—some 6223.0 feet above mean sea level. *See* 30 Ops. Cal. Atty. Gen. 262, 263 (1957). The natural ordinary high watermark—resulting from the inability of the relatively narrow outlet to immediately drain the heavy inflows at certain seasons—has been found by State studies to be approximately two feet higher.[1]

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[1] A study of Lake Tahoe performed by the California-Nevada Interstate Compact Commission in 1957 (R. 3714), calculated the natural

In 1870, the Donner Lumber & Boom Company constructed a log dam in the Truckee River a short distance downstream from the outlet of Lake Tahoe, artificially raising lake levels during at least certain portions of the year. *See* App. A at A-3; 30 Ops. Cal. Atty. Gen. at 263-264. After a succession of private owners, the dam was acquired through condemnation by the United States in 1915 as a part of the Newlands Reclamation Project. *United States v. Truckee River General Electric Co.*, No. 14861 (USDC N.D. Cal. 1915) (unpub. opn.); 30 Ops. Cal. Atty. Gen. at 263-264. Since 1926, the operation of the dam has been under the control of the Truckee-Carson Irrigation District as agent of the United States. 30 Ops. Cal. Atty. Gen. at 264. At no time has the State of California owned, operated or controlled the dam or the water levels of the lake. Nor did the littoral proprietors ever agree to those regulating activities by third parties. On the contrary, both they and the State protested repeatedly. *Id.* at 264-266.

In order to assure adequate flows in the Truckee River for the benefit of the Newlands Reclamation Project and power interest along the Truckee River, an agreement known as the Truckee River Agreement (June 13, 1935) was negotiated between the United States, the Sierra-Pacific Power Company, the Truckee-Carson Irrigation District, the Washoe County Conservation District and a number of water users along the Truckee River. Neither the State of California nor any of the numerous littoral owners around Lake Tahoe were parties. The agreement sets the upper and lower limits within which the United States may use Lake Tahoe for storage purposes. In 1944, its provisions were incorporated into a decree adjudicating the water rights of users along the Truckee River. *United States v. Orr Water Ditch Co.*, Equity No. A3 (USDC D. Nev. 1944) (unpub. opn.). The decree does not affect any land interests at the edge of Lake Tahoe. 30 Ops. Cal. Atty. Gen. *supra*. Rather, the Truckee-

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high waterline of Lake Tahoe and fixed it at elevation 6224.84 feet. R. 3732. *See also* R. 3256-3779, 3946-4041. This study belies the rationale of the court of appeal below, which apparently relied upon language in *Fogerty* to the effect that location of the ordinary high waterline under natural conditions is virtually impossible. *See* App. A at A-16 to A-17 n.12.

Carson Irrigation District is required to operate the outlet dam so that the lake does not rise above the level of 6229.1 feet above mean sea level, nor is it to fall below the natural rim elevation of 6223.0 feet. In fact, Lake Tahoe has not reached 6229.1 feet since 1917, years before the agreement and decree were entered into. *Id.* at 265. Implementation of the Truckee River Decree, however, had led to the artificial raising of lake levels above the natural ordinary high waterline for a portion of each year. *Id.* at 267-268.

2. Petitioners are owners of littoral lands bordering the lake. They trace their title back to federal grants made between 1860 and 1890. R. 1670-1689. Assuming California once held the shorezone between the natural low and high waterlines (see note 6, *infra*), the State relinquished that area to the then littoral proprietors by enactment of section 830 of the California Civil Code in 1872. *See* p. 3 *supra*. Consistent with that provision, subsequent deeds in petitioners' chain of title included the shorezone to the low waterline of the lake. It is now undisputed that petitioners' ownership runs to the low waterline.

Neither in 1872, nor at any time during the ensuing 100 years, was the slightest doubt raised concerning the unfettered ownership of the shorezone by the littoral proprietors. Indeed, their title was repeatedly confirmed by judicial decisions[2] and opinions of the Attorney General.[3] And no suggestion of a public easement over this area was ever advanced. Accordingly, petitioners and their predecessors were not concerned for their shorezone title when lake levels periodically rose through implementation of the

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[2] *Maginnis v. Hurlbutt*, 49 Cal. App. 460, 193 P. 606 (1920); *Craig v. White*, 187 Cal. 489, 202 P. 648 (1921); *Anderson v. Trotter*, 213 Cal. 414, 2 P.2d 373 (1931); *City of Los Angeles v. Aitken*, 10 Cal. App. 2d 460, 52 P.2d 585 (1935); *Crews v. Johnson*, 202 Cal. App. 2d 256, 21 Cal. Rptr. 37 (1962); *United States v. Gossett*, 416 F.2d 565 (9th Cir. 1969); *Lyon v. Western Title Insurance Co.*, 178 Cal. App. 3d 1191, 224 Cal. Rptr. 385 (1986).

[3] 43 Ops. Cal. Atty. Gen. 291 (1964); 30 Ops. Cal. Atty. Gen. 262 (1957); 23 Ops. Cal. Atty. Gen. 306 (1954); 23 Ops. Cal. Atty. Gen. 97 (1954); Ops. Cal. Atty. Gen. 3100 at 5-6 (1916).

Truckee River Decree—which only gave the United States the right of storage within certain defined limits and was declared not to extend the State's lakebed rights. *See* 30 Ops. Cal. Atty. Gen. at 268.

This period of tranquility came to an abrupt end on March 8, 1977, when the California Attorney General disaffirmed all prior attorney general opinions that had defined the State's interest in the bed of Lake Tahoe as ending at the natural low waterline. *See* Letter from California Attorney General Evelle Younger to Wm. F. Northrop (Mar. 8, 1977), R. 3930-3942. He now claimed for the State lands up to the high watermark—the position the State had taken with respect to Clear Lake in *State v. Superior Court (Lyon)*, which was then pending in another state trial court. *See* App. D, *infra*. In that case, commenced in 1976, the State had for the first time sought to abrogate the provisions of Civil Code section 830.[4] Immediately after the issuance of this opinion, the California State Lands Commission (the agency responsible for management of state sovereign lands) laid claim to all lands bordering Lake Tahoe up to the artificially elevated ordinary high waterline.

3. Petitioners responded by filing this action on March 30, 1977, seeking to quiet title to their lands to the natural low watermark and to enjoin the State from proceeding further. Their motion for preliminary injunction was granted by the Placer County Superior Court on October 17, 1977. The order was appealed by the State, but was upheld by the Court of Appeal for the Third Appellate District on March 28, 1979. Thereafter, petitioners and the State filed cross-motions for partial summary judgment on the issue of whether the State, in the face of Civil Code section 830, could extend its sovereign ownership in the bed of navigable lakes to the ordinary high waterline and, if not, whether it could belatedly assert a public trust easement over the shorezone. The superior court granted petitioners' motion and

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[4] Although attempting to justify the State's newly found rights to high water, the Attorney General acknowledged that his office had previously been of the opinion that the State relinquished its interest above the low water in 1872. R. 3932 & n.5.

concluded, as a matter of law, that no portion of Lake Tahoe landward of the last natural ordinary low waterline was subject to any State interest. *See* App. C at A-22.

The State successfully petitioned the California Supreme Court for a writ of mandate in this action and in the companion *Lyon* case, which had proceeded along a similar line and had produced an identical ruling with regard to Clear Lake. By a vote of four to two, that court reversed in both cases, simultaneously issuing separate, but complementary, opinions. Apps. C and D, *infra*. Acknowledging that the State had for more than a century abided by the provisions of Civil Code section 830 and claimed no interest (public trust or otherwise) above the natural low watermark, the court nevertheless held that a public trust easement attached to the shorezone down to the low watermark. App. D at A-51, A-63. Also in an abrupt departure from existing California law,[5] the court went on to hold that the State's interest could be extended landward as a result of the artificial raising of the lake level by third parties. App. C at A-30 to A-31. This Court denied petitions for certiorari to review these decisions. *Lyon v. California*, 454 U.S. 865 (1981).

4. The case was remanded to the trial court to locate the ordinary high watermark boundary of the public trust easement and the ordinary low watermark boundary of state ownership of the bed of Lake Tahoe. The State successfully moved for summary adjudication of these two boundaries, arguing that the levels established by the Truckee River Decree in 1944 not only fixed the maximum and minimum lake levels for purposes of the federal government's regulation of the lake, but also established the boundaries of the State's sovereign interest in the bed of Lake Tahoe. App. B, *infra*. Petitioners appealed again to the court of appeal. On November 24, 1986, that court rejected the reasoning of the trial court, but reached a result only slightly less favorable to the State. App. A, *infra*.

Invoking the California Supreme Court's *Fogerty* decision, the appellate court held that the ordinary high waterline was to be

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[5] *See* 30 Ops. Cal. Atty. Gen. at 269, 273.

fixed under the doctrine of prescription—albeit the State first claimed any interest above low water only a month before this suit. The court of appeal set the ordinary high waterline at 6228.75 feet above mean sea level, the highest level that Lake Tahoe had reached for any five consecutive years (1967-71) since artificial regulation of the lake began, and declared the State's public trust easement to extend to that line. App. A at A-15. Petitioners then sought review in the California Supreme Court, but the petition was denied on March 4, 1987. App. E, *infra.*

The practical effect of the California court's action has been to superimpose a public trust easement over all lands lying above elevation 6223.0 feet up to elevation 6228.75 feet. This five-foot vertical elevational rise, when translated to horizontal distance, embraces extensive tracts of the gradually sloping shore, including all dry beaches surrounding Lake Tahoe. Under California's public trust doctrine, these lands remain subject to the public trust easement even when not covered by waters of the lake.

REASONS FOR GRANTING THE WRIT

Once upon a time, when state governments wanted private land for public use, they bought and paid for it—by conventional purchase, if possible; otherwise, by exercising the power of eminent domain. That was thought to be what the Constitution commanded of all governments. *See Monogahela Navigation Co. v. United States*, 148 U.S. 312, 324-326 (1893); *Chicago, Burlington & Quincy Railroad v. City of Chicago*, 166 U.S. 226, 241 (1897). To be sure, this age of innocence soon gave way to the idea that regulation was the free alternative to condemnation. And this Court has not been ungenerous in sustaining such measures against the charge that they effected an uncompensated "taking." *See e.g., Keystone Bituminous Coal Association v. De Benedictis*, No. 85-1092 (March 9, 1987), and cases cited therein at slip op. 12-13, 16-17, 18-19, 22, 25. It became clear, however, that some limits exist: regulation that "goes too far" in appropriating private property to public uses will be struck down unless payment is made. *E.g., Hodel v. Irving*, No. 85-637 (May 18, 1987); *Loretto v. Teleprompter Manhattan CATV Corp.*, 458 U.S. 419 (1982); *Kaiser Aetna v. United States*, 444 U.S. 164,

178-180 (1979); *Pennsylvania Coal Co. v. Mahon*, 260 U.S. 393, 413-416 (1922). And so, a new and more fool-proof scheme of cost-free expropriation has been invented. This device is the so-called "public trust" doctrine.

We are not challenging the State's regulatory authority to curtail a public nuisance or to assure reasonable land use planning through adoption of zoning laws under the police power. Nor do we meddle with the aspect of the public trust theory which inhibits state officers, for the future, from alienating or encumbering, except for special "public" purposes, permanently or periodically submerged lands still owned by the State. Our concern, rather, is with the belated superimposition of a pervasive "public trust" easement on private property which was severed from the public domain in the Nineteenth Century without any hint of restriction. Because retrospective legislation or administrative action attempting to accomplish the same result obviously would raise a serious "taking" question, it has become the fashion to ask state courts for a declaration that—albeit no one then knew it—the law impressed a "servitude" of the kind now claimed on coastal or riparian or littoral land when it was originally sold or ceded. *E.g., Summa Corp. v. California ex rel. State Lands Commission*, 466 U.S. 198 (1984); *Hughes v. State of Washington*, 389 U.S. 290 (1967); *see* R. Lazarus, "Changing Conceptions of Property and Sovereignty in Natural Resources: Questioning the Public Trust Doctrine," 71 Iowa L. Rev. 631, 643-664 (1986). *Cf., California ex rel. State Lands Commission v. United States*, 457 U.S. 273, 277 (1982); *Robinson v. Ariyoshi*, 753 F.2d 1468 (9th Cir. 1985), *vacated and remanded*, No. 85-406 (June 23, 1986); *Nollan v. California Coastal Commission*, 177 Cal. App. 3d 719 (1986), *juris. noted*, No. 86-133 (October 20, 1986); *Matcha v. Mattox*, 711 S.W.2d 95 (Texas Ct. App. 1986), *cert. denied*, No. 86-1346 (April 20, 1987).

Whatever may be the case elsewhere, California has been uninhibited in its rediscovery of the public trust doctrine. It has been found to impress an easement on almost all privately owned land near water, including non-navigable tidelands, whether or not now filled (*see Summa Corp. v. California ex rel. State Lands Commission*, 466 U.S. at 202 n.2, 204-205, 206 n.4); waterways

usable only for pleasure boating and not navigable under the federal commercial navigability in fact test (*National Audubon Society v. Superior Court*, 33 Cal. 3d 419, 658 P.2d 709 (1983), *cert. denied sub nom., City of Los Angeles Department of Water & Power v. National Audubon Society*, 464 U.S. 977); the beach above high tide (*Nollan v. California Coastal Commission, supra*); former submerged lands and tidelands now accreted to coastal uplands (*see California ex rel. State Lands Commission v. United States*, 457 U.S. at 277); the shore of a navigable non-tidal lake between ordinary high and low watermark (*State v. Superior Court (Lyon), supra, cert. denied sub nom., Lyon v. California*, 454 U.S. 865 (1981)); and, in this case, the lake shore above the natural high waterline. According to California, moreover, this easement persists long after the area has become high and dry and it is so pervasive that, as this Court has commented, what is left to the owner is "little more than the naked fee." *Summa Corp.*, 466 U.S. at 205, 206 n.4.

Surely, the time has come to call a halt to such an unrestrained appetite. The California Supreme Court has declined the most recent opportunity to do so and we accordingly turn to this Court. In California itself, there are some 4000 miles of shoreline and many thousands of acres implicated. *See* App. D at A-39; App. C at A-24. These include substantial tracts owned by the United States, both as "reserved lands" that never left federal ownership and lands later reacquired. *See* Pet. for Rehearing in No. 81-163, *Lyon v. California* at A-5 to A-6, A-11, A-16, A-22 to A-23. Besides, California is not quarantined and gluttony is a contagious vice. *See* R. Lazarus, *supra*.

We make two points, both invoking the general proposition that judicial imposition of the kind of pervasive easement involved here on land held in unencumbered private ownership for a century amounts to a "taking" without compensation in violation of the Constitution. We first apply this principle to the State's claim of public trust rights to any part of the "shorezone" of Lake Tahoe, above the mean low waterline. Second, we focus separately on the portion of the shore *above* the natural mean *high* waterline and submit that California's attempted extension of the

easement to that area is additionally vulnerable because it reaches lands never held by the State.

1. For present purposes, we assume that, upon its admission to the Union in 1850, California acquired title to the bed and shores of all navigable lakes to ordinary high watermark.[6] *See Barney v. City of Keokuk*, 94 U.S. 324 (1877). But even the California Supreme Court concedes that, by enactment of Civil Code section 830 in 1872, the State could, and did, relinquish ownership of the shore—between high and low watermark—to the littoral proprietors. App. D at A-47 to A-52. And that remains the situation today, section 830 being still good law. The State's claim, therefore, is necessarily stated as a "public trust" *easement* over private soil. The difficulty is that no one in California had ever heard of such a public servitude attaching to the shore of a freshwater lake—except perhaps for navigation—until a hundred years after Civil Code section 830 was enacted. *See* App. D at A-53 to A-63; *id.* at A-68 to A-72 (Clark, J., dissenting). *See also Lyon v. Western Title Insurance Co.*, 178 Cal. App. 3d 1191, 1197-1203, 224 Cal. Rptr. 385, 388-93 (1986).[7] It seems plain

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[6] It is arguable that, by adopting the common law of England even before statehood in 1850, California immediately elected to disclaim both the bed and shores of non-tidal navigable waters and that the effect of adopting Civil Code section 830 in 1872 was to now claim the bed for the State, but to leave the shore in private ownership. *See* App. D at A-38 to A-46. Under this scenario, California *never* owned the shorezone. However, we do not here challenge the California Supreme Court's rejection of this history. *See id.* at A-46.

[7] The California court's reliance on *Illinois Central Railroad v. Illinois*, 146 U.S. 387 (1892), is obviously misplaced . *See* App. D at A-55 to A-57. As the dissent pointed out, that decision relates to the wholesale alienation of the permanently submerged *bed* of Lake Michigan in the vicinity of Chicago to a favored monopoly, not the cession of the *shorezone* indifferently to all littoral owners. *See* App. D at A-72. The case, moreover, has been distinguished as merely stating Illinois law (*Appleby v. City of New York*, 271 U.S. 364, 395 (1926)), and, at all events, presumably has not survived the Court's decision in *Oregon ex rel. State Land Board v. Corvallis Sand & Gravel Co.*, 429 U.S. 363 (1977).

that the belated superimposition of a servitude "of such substantial magnitude" (*Summa Corp. v. California ex rel. State Lands Commission*, 466 U.S. at 209) works an impermissible taking of property without compensation.

It is no answer to say that, as owner of the shore a century ago, California was free to burden the land with any conditions it chose when it ceded it to the littoral proprietors. What might have been done in 1872, but was not, cannot be done today—short of payment. Otherwise, one might plausibly argue that because California could have retained the whole fee interest in the shore lands, the State may now recapture the entire title without tendering compensation. A sufficient illustration of the principle that timing is often critical is to be found in *Kaiser Aetna v. United States, supra* p. 8. There, the Court held that although the United States could have conditioned permission to dredge a "private" pond upon the owners' conceding public navigation rights, the later exaction of such an easement would require the payment of just compensation. *Kaiser Aetna*, 444 U.S. at 179-180. *See also Leo Sheep Co. v. United States*, 440 U.S. 668, 687-688 (1979); *Federal Power Commission v. Niagara Mohawk Power Corp.*, 347 U.S. 239, 248-249, 254-256 (1954). Needless to say, *Kaiser Aetna* equally put to rest any notion that the imposition of a public trust *easement* over partially or wholly submerged lands, cannot amount to a "taking" in the constitutional sense. *See United States v. Riverside Bayview Homes, Inc.*, No. 84-701 (Dec. 4, 1985) at slip op. 5 n.4. In *Kaiser Aetna*, merely opening a "private" waterbody to public navigation without any further assertion of public rights was held to constitute a taking. Here, of course, the easement asserted is much more pervasive.

Nor is an unconstitutional taking avoided because vested property rights are manipulated out of existence by *judicial* fiat, rather than legislative or executive action. We appreciate that a federal court, even this Court, must be especially hesitant to declare that a state judicial decree, defining state law, violates the Constitution. *Cf. Demorest v. City Bank Farmers Trust Co.*, 321 U.S. 36, 42-43 (1944). Yet, the Court has long ago settled that state judicial action is subject to constitutional scrutiny. *E.g., Ex Parte*

Virginia, 100 U.S. 339 (1880); *Nebraska Press Association v. Stuart*, 427 U.S. 539 (1976). *See Pulliam v. Allen*, 466 U.S. 522, 536-545 (1984). In a variety of contexts, moreover, the decision of a state court has been reviewed here to determine whether it has made such an arbitrary or unpredictable declaration of local law as to deny due process or otherwise deprive the petitioner of a federal right. *E.g., Ward v. Board of County Commissioners of Love County*, 253 U.S. 17 (1920); *Georgia Railway & Power Co. v. Town of Decatur*, 262 U.S. 432, 438 (1923); *Indiana ex rel. Anderson v. Brand*, 303 U.S. 95 (1938); *Demorest v. City Bank Farmers Trust Co., supra*; *NAACP v. Alabama ex rel. Patterson*, 357 U.S. 449, 457-458 (1958); *NAACP v. Alabama ex rel. Flowers*, 377 U.S. 288, 293-302 (1964); *Bouie v. City of Columbia*, 378 U.S. 347-355, 362 (1964). Indeed, in *Muhlker v. New York & Harlem Railroad* 197 U.S. 544, 570 (1905), the Court struck down a state court judgment expressly on the ground that it effected an uncompensated taking of property. And, more recently, the principle was espoused in Justice Stewart's concurring opinion in *Hughes v. State of Washington*, 389 U.S. at 296-297. *See also Brewer-Elliott Oil & Gas Co. v. United States*, 260 U.S. 77, 88 (1922).

2. A further question arises in respect to that portion of the lake shore that lies between the natural high watermark and the present artificially higher level resulting from the operation of the Truckee River dam. Although the California Supreme Court avoided the question (*see* App. C at A-28 to A-31), we deem it clear that the State cannot claim to have ever owned this portion of the shore. The Equal Footing doctrine vested title to the bed and shores of the lake, in its natural condition, as it was in 1850. *E.g., Utah v. United States*, 403 U.S. 9, 10-11 (1971). The effect of subsequent artificial drainage must be ignored. *E.g., United States v. Holt State Bank*, 270 U.S. 49, 52-53, 56-57 (1926). By a parity of reasoning, the boundary of state ownership does not shift when a lake level is later boosted up by damming its outlet. Indeed, the Court has stated that the constitutional "grant" is fully "spent" at statehood. *Oregon ex rel. State Land Board v.*

Corvallis Sand & Gravel Co., 429 U.S. 363, 371, 374 (1977).[8] Nor is there any other basis for state title above the natural high watermark before 1872 when Civil Code section 830 formally ceded the entire shore to the littoral proprietors. Obviously, no prescriptive rights could yet have matured, the installation of the first dam having only occurred in 1870, two years earlier. *See* App. C at A-30.

As to this area, therefore, there having been no transfer from the State, it is impossible to assert that a public trust servitude was impressed on the soil at the time of conveyance. How then did the easement attach? Almost as an afterthought, the California Supreme Court announced that it was acquired by the State at some unspecified date through the operation of prescription. App. C at A-29 to A-31. This, it must be stressed, is not based on California precedents, admittedly lacking (App. C at A-29), but on one old case from Arkansas and another from Iowa (App. C at A-30). For at least two reasons, this will not do.

First, the rule of law invoked is wholly new and unexpected. As we have said, the California Supreme Court conceded that no previous California case suggested a public trust easement attaching to private land by adverse possession. And, what is more, the court below expressly concluded that the State was claiming no such rights over the lake shore until 1977, just before the suit was filed. App. A at A-12. Indeed, the operation of the Truckee River dam in Nevada that directly raised the lake level was at no time under the control of the State of California. *See Nevada v. United States*, 463 U.S. 110 (1983). Thus, neither the alleged beneficiary nor the victim was in a position to affect the events that are now

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[8] It is not clear whether the ambulatory boundary rule reflected in the Submerged Lands Act, 43 U.S.C. § 1301(a)(1), is the *constitutional* standard for purposes of the Equal Footing Doctrine, even when the United States is not the littoral owner. *See California ex rel. State Lands Commission v. United States*, *supra* p. 9. But, at all events, the ambulatory principle reaches only gradual changes, not sudden avulsive alterations of the shoreline, especially when artificially caused. *E.g.*, *Arkansas v. Tennessee*, 246 U.S. 158, 173 (1918); *Missouri v. Nebraska*, 196 U.S. 23, 34-36 (1904); *Nebraska v. Iowa*, 143 U.S. 359, 361, 367, 370 (1891).

said to have worked a shift of property interests; neither was even aware of the supposed significance of these activities, the State expressly disclaiming any effect on land interests; and, at various times, both the State and the littoral owners protested the artificial raising of the lake level. To hold that a prescriptive title ripened under these circumstances would be novel in any jurisdiction.

There is, in any event, a further obstacle. Even the federal navigational servitude does not condone the uncompensated flooding of fast lands surrounding a navigable waterbody above the level of ordinary high water. *E.g. United States v. Rands*, 389 U.S. 121, 123 (1967). We therefore do not appreciate how the littoral owners on Lake Tahoe can have lost any part of their land interest above that line to the State of California merely because, without obtaining their consent or making any payment, third parties (whether private operators or the United States) caused some part of their lands to be flooded. Unsurprisingly, California's Attorney General himself shared our view as recently as 1957 and 1964. 30 Ops. Cal. Atty. Gen. 262, 268 (1957); 43 Ops. Cal. Atty. Gen. 291, 295 (1964). It is injury enough that the littoral owners have suffered a physical invasion of their uplands at various times; there is no warrant for also subjecting those lands to the perpetual public trust easement now asserted. Any state law rule to the contrary must be deemed to work an unconstitutional taking of private property. To paraphrase the Court's ruling in a closely related context:

> It is not for a state, by courts or legislature, in dealing with the general subject of navigable [lakes], to adopt a retroactive rule for determining [the high waterline] which would destroy a title already accrued under federal law and grant, or would enlarge what actually passed to the state, at the time of her admission, under the constitutional rule of equality here invoked.

Brewer-Elliott Oil & Gas Co. v. United States, 260 U.S. at 88.

3. Generally speaking, courts are reluctant to upset rules and rulings affecting real property rights. *Arizona v. California*, 460 U.S. 605, 620 (1983). *See also Nevada v. United States*, 463 U.S.

at 129 n.10; *Leo Sheep Co. v. United States*, 440 U.S. at 687-88; *United States v. Title Insurance & Trust Co.*, 265 U.S. 472, 486-87 (1924). A sufficient reason, of course, is that private landed interests typically implicate substantial values, economic and psychological, and are uniquely associated with stability and predictability. Like considerations underlie the special protection accorded to real property by our Constitution, which inhibits official action that impairs vested rights without "due process of law," or without "just compensation." U.S. Const., Amends. V and XIV. For the most part, the balance has been kept right by the courts themselves. But recent experience, especially in California, does not justify continued reliance upon judicial self-restraint—much less on the self-discipline of state governments invoking the courts. It *is* now necessary to make clear that, at some point, the Constitution itself forbids confiscation of private property by judicial re-interpretation of the law.

This is an extreme case. Unlike other recent examples (*e.g., Coastal Petroleum Co. v. American Cyanamid Co.*, 492 So. 2d 339 (Fla. 1986), *cert. denied sub nom., Mobil Oil Corp v. Board of Trustees*, No. 86-823 (February 26, 1987)), there is no pretense here that the State law rules, applied to effectively strip petitioners of their lakeshore rights, were settled propositions, in place when petitioners acquired their interests a century ago. On the contrary, it is frankly conceded that this is the first application to a freshwater setting of legal principles that are none too well established in any context; and the dramatic impact of the ruling for this case, and others to follow, is not disguised. Nor is there now any arguable "finality" or "ripeness" question.[9] Here, the physical extent and the legal intensity of the burden have been fully defined and all avenues of relief (short of this Court) have been firmly shut. *Compare MacDonald, Sommer & Frates v. Yolo County*, No. 84-2015 (June 25, 1986), and cases cited at slip op.

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[9] Such a problem may have existed when the Court considered and denied the earlier petitions for certiorari. *Lyon v. California*, 454 U.S. 865 (1981). At that time, the case had been remanded to the trial court for a determination of both the high and low watermarks (*see* p. 7, *supra*), and the extent of the lands affected by the ruling was therefore not yet known.

8-10. In sum, this case is an appropriate vehicle for a needed declaration that the Constitution still protects real property against expropriation, even when the state invokes its courts to work that result.

CONCLUSION

For the reasons stated, a writ of certiorari should be granted to review the decision of the California Court of Appeal.

Respectfully submitted,

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MAY 1987

(Appendices follow)

Appendix A

In the Court of Appeal
of the State of California
in and for the Third Appellate District
(Placer)

3 Civil 25115
(Super.Ct.No. 48281)

Charles F. Fogerty,
Tahoe Shorezone, Representation, et al.,
Plaintiffs and Appellants,

vs.

State of California, et al.,
Defendants and Respondents.

[Filed Nov. 24, 1986]

APPEAL from a judgment of the Superior Court of Placer County, Keith Sparks and George Yonehiro, Judges. As modified, the judgment is affirmed.

William T. Chidlaw, Peter E. Racobs, Washburn & Kemp, and Edgar B. Washburn for Plaintiffs and Appellants.

John K. Van De Kamp, Attorney General, N. Gregory Taylor, Assistant Attorney General, Jan Stevens and David B. Judson, Deputy Attorneys General for Defendants and Respondents.

In State of California v. Superior Court (Lyon) (1981) 29 Cal.3d 210 (hereafter "*Lyon*") our Supreme Court held that the lands lying between the low and high watermarks of Clear Lake are owned by their littoral owners subject to a "trust" interest held by the State of California for the benefit of the public for purposes of commerce, navigation, fishing, recreation, and preservation of the land in its natural state. (*Id.*, at pp. 226-233.) In State of California v. Superior Court (Fogerty) (1981) 29 Cal.3d 240 (hereafter "*Fogerty*") our high court held, in this very case, that the public trust enunciated in *Lyon* was applicable to Lake Tahoe. (*Id.*, at pp. 243, 247.) In this appeal, we hold that, for purposes of

determining the boundaries of land along the shore of Lake Tahoe subject to the public trust, the low watermark of the lake is 6223 feet above sea level, Lake Tahoe datum, and the high watermark is 6228.75 feet above sea level, Lake Tahoe datum.

PROCEDURAL BACKGROUND

This litigation began in 1977 when the Attorney General informed the State Lands Commission that the state claimed fee ownership of the shorezone, the property lying between the low and high watermarks of navigable nontidal lakes and rivers. (*Fogerty*, supra, 29 Cal.3d at p. 243.) The Commission proposed to record claims to such lands in county recorders' offices throughout the state. (*Ibid.*) Thereupon, plaintiffs Charles and Stella Fogerty and other owners of property along the shores of Lake Tahoe, and Tahoe Shorezone Representation, a corporation which represents many shorezone owners, filed this litigation claiming they and not the state owned the lands between low and high waters. (*Ibid.*) In *Lyon* our Supreme Court resolved this question, concluding private citizens held fee title to the lands to the low watermark. (*Lyon*, supra, 29 Cal.3d at p. 226.) The court went on to hold, however, that the land between low and high water was subject to the public trust. (*Id.*, at pp. 226-233.)

The court first determined that California acquired sovereign fee ownership of the lands between low and high water in nontidal navigable lakes and rivers upon its admission to the Union. (*Lyon*, supra, at pp. 217-222.) The court next determined that, by the enactment of Civil Code section 830 in 1872, the Legislature granted fee title to the lands in question to the littoral property owners.[1] (*Id.*, at pp. 222-226.) Finally, the court considered whether the grant of fee title was free of the public trust described

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[1] Civil Code section 830 provides that "Except where the grant under which the land is held indicates a different intent, the owner of the upland, when it borders on tidewater, takes to ordinary high-water mark; when it borders upon a navigable lake or stream, where there is no tide, the owner takes to the edge of the lake or stream, at low-water mark; when it borders upon any other water, the owner takes to the middle of the lake or stream."

in City of Berkeley v. Superior Court (1980) 26 Cal.3d 515. The court concluded it was not, and that the trust still applied, relying on the settled proposition that lands held by the state in trust remain subject to the trust once conveyed to private parties unless the conveyance was made for trust purposes. (*Lyon,* supra, at pp. 226-232.)

In *Fogerty,* the People sought a writ of mandate from our Supreme Court after the trial court had entered partial summary judgment decreeing that no real property lying landward of the last *natural* low watermark of Lake Tahoe was subject to the public trust. (29 Cal.3d at p. 243.) The court addressed two questions not discussed in *Lyon.*

First, the court concluded the People may not be estopped from asserting their public trust interest in those lands lying between low and high watermarks: "The exercise of the police power has proved insufficient to protect the shorezone. The urgent need to prevent deterioration and disappearance of this fragile resource provides ample justification for our conclusion that the People may not be estopped from asserting the rights of the public in those lands." (*Fogerty,* supra, 29 Cal.3d at p. 247.)

Second, the court concluded the boundary between public and private ownership was to be measured by using the "current" level of the lake. (*Id.,* at pp. 248-249.) Although Lake Tahoe had existed before statehood, its elevation was raised significantly by the construction of a dam across its natural outlet into the Truckee River in 1870. (*Fogerty,* supra, 29 Cal.3d at p. 247.) Lands were inundated which, before statehood, had belonged to the littoral owners free of the public trust. The court therefore faced the question whether these newly-flooded lands remained free of the trust or had become subject to it. (*Ibid.*)

The court began by noting with approval the People's contention that it would be difficult if not impossible to reconstruct the natural water levels of a lake. (*Id.,* at p. 248.) The court reasoned that "The monumental evidentiary problem which would be created by measuring the boundary line between public and private ownership in accordance with the water level which existed prior to the construction of [the dam] provides a convinc-

ing justification for accepting *the current level of the lake* as the appropriate standard." (*Ibid.*, emphasis added.)

The court went on to note, "Moreover, the dam at Lake Tahoe has been in existence since 1870, long past the period required for the acquisition of prescriptive rights by the state of the lands in question. (Civ. Code, § 1007; Code Civ. Proc., § 325.) It has been held in other jurisdictions that a landowner loses ownership of property covered by water resulting from the construction of a dam if the condition has continued for the period required for the acquisition of prescriptive rights. (*State v. Parker* (1918) 132 Ark. 316 [200 S.W. 1014, 1016]; *State v. Sorenson* (1937) 222 Iowa 1248 [271 N.W. 234, 238-239].) *Sorenson* stated that in these circumstances 'the artificial condition is . . . stamped with the character of a natural condition, and the title to the lands covered by the waters of the lake is deemed to have passed from private ownership to the same trust as that of lands covered by the waters of natural navigable lakes. The state, and private owners, as well, of lands affected by the artificial condition, may enforce the maintenance of that condition.' " (*Fogerty*, supra, 29 Cal.3d at pp. 248-249.) Thus, the court held the trial court had erred in using the pre-dam level of the lake to set the low watermark. (*Id.*, at p. 249.)

The *Fogerty* court issued a writ of mandate directing the trial court (a) to vacate its order granting the landowners' motion for partial summary judgment and (b) to grant the People's motion for partial summary judgment and partial judgment on the pleadings "insofar as consistent with the views expressed above." (*Ibid.*)

In *Lyon*, the court added a footnote referring to *Fogerty* and directing "that the determination of the boundary between public and private ownership must be assessed in accordance with the shoreline of the lake as it exists presently." (*Lyon*, supra, 29 Cal.3d at p. 232, fn. 20.) The *Lyon* court issued a writ identical to that in *Fogerty*. (*Id.*, at p. 233.)

Following our Supreme Court's issuance of its writ to the trial court in this case, the state moved for summary judgment. The state submitted voluminous exhibits in support of its motion

which established, among other things, that several agencies of government including the U.S. Army Corps of Engineers, the California Tahoe Regional Planning Agency and the bistate Tahoe Regional Planning Agency have consistently used the figure of 6229.1 feet above sea level as the lake's high watermark. That figure had its genesis with the California-Nevada Interstate Compact Commission in 1934 and was premised on the volume of water needed by users along the Truckee River. It was incorporated in the Truckee River Agreement of 1935 which was negotiated by the United States and several major users of Truckee River water. (See generally 30 Ops.Cal.Atty.Gen. 262 (1957).) It was also incorporated in a consent decree which adjudicated the water rights of all users of Truckee River water. (U.S. v. Orr Water Ditch Co. (U.S. Dist. Ct., Nev. 1944) Equity No. A3.) However, the littoral property owners were never made parties to the negotiations or the litigation. (30 Ops.Cal.Atty.Gen., supra, at p. 268.)

Defendants' exhibit R showed the maximum and minimum lake elevations from 1900 to 1984. The exhibit revealed that since 1917 the lake had never reached its negotiated high watermark of 6229.1 feet.[2] The data summarized in the exhibit are undisputed by the parties.

The trial court entered summary judgment in favor of the state establishing among other things that: (1) the lake's *high* watermark, as well as its low watermark, is to be determined in accordance with the lake's current conditions; and (2) the high watermark of Lake Tahoe constituting the uppermost limit of the lake subject to the public trust is located at 6229.1 feet above sea level, Lake Tahoe datum.[3]

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[2] However, it had come close on several occasions. Since the entry of the consent decree in 1944 (which established the present mode of water level regulation) the lake exceeded elevation 6229 feet on a total of 81 days. During that time, however, it never rose the next one-tenth of a foot to the theoretical maximum of 6229.1 feet.

[3] The trial court's judgment established the following:

"1. Plaintiff landowners holding otherwise valid grants to the shores of Lake Tahoe hold to the low water mark thereof;

Plaintiffs' appeal challenges these two rulings. As we shall explain, we conclude many of plaintiffs' contentions are foreclosed by *Lyon* and *Fogerty*. However, plaintiffs also assert the trial court erroneously fixed the high watermark at a theoretical maximum elevation which the lake has not reached since 1917. This contention is meritorious; we shall modify the trial court's summary judgment to reflect the high watermark as disclosed by the record in accordance with the state's acquisition of its property interest by prescription.

Plaintiffs have acquiesced in the summary judgment's establishment of 6223 feet as the lake's low watermark and do not challenge that figure on appeal. (See 9 Witkin, Cal. Procedure (3d ed. 1985) Appeal, § 479, p. 469.) Defendants have not cross-appealed (see op. cit. supra, at pp. 394-395) and may make no challenge of their own. Accordingly, the figure of 6223 feet as the low watermark is conclusively established. Consequently, as mod-

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"2. The title of littoral owners at Lake Tahoe is impressed with a public trust for commerce, navigation, fisheries and environmental preservation to the high water mark thereof;

"3. The state may not be estopped from asserting the rights of the public to the high water mark at Lake Tahoe;

"4. The high and low water marks at Lake Tahoe are to be determined in accordance with the current condition of that lake;

"5. The low water mark constituting the fee boundary between [the bed of Lake Tahoe in] state sovereign ownership and upland fee ownership is located at 6223 feet above sea level, Lake Tahoe datum;

"6. The high water mark of Lake Tahoe constituting the uppermost limit of that lake subject to the public trust is located at 6229.1 feet above sea level, Lake Tahoe datum;

"7. Any right of the plaintiffs herein to pier out to the line of navigation in Lake Tahoe is subject to the authority of the State of California and its designees to impose reasonable regulations;

"8. Plaintiffs holding property littoral to the bed of Lake Tahoe have not been deprived of the use or enjoyment thereof without compensation, contrary to the provisions of article 1, section 19 of the state Constitution and amendments V and XIV of the United States Constitution."

ified to reflect the correct high watermark, the judgment shall be affirmed.

DISCUSSION

I

Certain of Plaintiffs' Contentions Cannot be Reconciled with Lyon and Fogerty.

Read together, we think *Lyon* and *Fogerty* establish the following rules: (1) the littoral property owners own the shorezone[4] of Lake Tahoe in fee simple to the low watermark of the lake in its "current" condition; (2) the property owners' fee simple title in the shorezone is impressed with a public trust analagous to an easement, acquired by the State of California pursuant to the doctrine of prescription and held for the benefit of the public for purposes of commerce, navigation, fishing, recreation and preservation of the land in its natural state.

In their attack on the judgment, plaintiffs have fired a fusillade of contentions that essentially ask us to undo what *Lyon* and *Fogerty* have done.[5] Thus, for example, although plaintiffs concede in their brief that "*Lyon* held that the public trust easement extends to the ordinary high watermark, making it necessary to ascertain the location of that line," plaintiffs contend the high watermark must be set according to conditions prevailing in 1850, when California was admitted to the Union.

This argument cannot be reconciled with *Fogerty's* conclusion the state has acquired prescriptive rights by the incursion of higher water caused by construction of the dam. (29 Cal.3d at pp.

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[4] The lands between low and high water. (*Fogerty*, supra, 29 Cal.3d at p. 245.)

[5] These include the assertions: (1) that our Supreme Court's decisions in *Lyon* and *Fogerty* constitute a "sudden and unpredictable change in state law" and thereby violate their constitutional rights to due process of law; (2) that the state acquired no prescriptive rights in new shorezone created by construction of the dam; and (3) that any prescriptive rights acquired by the state permit fewer uses of land by the public than the uses allowed by the public trust doctrine.

248-249.) The argument also asks us to disregard *Fogerty's* instruction that the low watermark must be set according to the "current" level of the lake. (*Id.*, at p. 248.) Plainly if the shorezone must be established, and if the lower boundary of that zone must be set by using the "current" level of the lake after construction of a dam, then the upper boundary cannot be set using the pre-dam level. That formula would theoretically allow the upper boundary of the shorezone to be set at an elevation lower than the lower boundary, so the shorezone would always be under water.[6] That result would effectively remove all shore from the shorezone. Such a result cannot be reconciled with *Fogerty*'s extensive discussion of the shorezone as "*land* between high and low water" necessary for the survival of birds, plants, and vegetation and useful for picnicking, hunting and biking. (*Fogerty*, supra, 29 Cal.3d at p. 245, emphasis added.)

As an inferior court, we are duty bound to follow and apply the law as interpreted by our Supreme Court. (Auto Equity Sales, Inc. v. Superior Court (1962) 57 Cal.2d 450, 455.) Plaintiffs suggest the Supreme Court's express instructions—to set the low watermark using post-dam conditions—are dicta and may be disregarded by this court. We cannot agree. Even when part of an opinion is not relevant to material facts, if it is responsive to an argument raised by counsel and intended for guidance of the court and attorneys upon a new hearing, it probably constitutes the basis of the decision and cannot be disregarded by a lower court as mere dictum. (United Steelworkers of America v. Board of Education (1984) 162 Cal.App.3d 823, 834-835; Paley v. Superior Court (1955) 137 Cal.App.2d 450, 460.) Here, in both *Lyon* and *Fogerty*, the Supreme Court issued writs directing lower courts to rule "consistent with the views expressed above." (*Lyon*, supra, at p. 233; *Fogerty* supra, at p. 249.) In these circumstances, *Fogerty*'s direction to use the "current" post-dam level of the lake

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[6] It is immaterial that the lower boundary now established—6223 feet—may or may not be lower than the high level of the lake in 1850. That figure had not been agreed upon and was not discussed by the court in *Fogerty*.

is not dictum.[7] (United Steelworkers of America v. Board of Education, supra, 162 Cal.App.3d at p. 835.) Indeed, the court's remarks on the question constitute the law of the case that we are obliged to follow. (People v. Shuey (1975) 13 Cal.3d 835, 841; compare Searle v. Allstate Life Ins. Co. (1985) 38 Cal.3d 425, 434.) We shall therefore use the "current" condition of the lake to set the high watermark.

II

The "Current" Level of Lake Tahoe is 6228.75 Feet Above Sea Level, Lake Tahoe Datum.

Plaintiffs contend the trial court erred in setting the high level of the lake it 6229.1 feet above seal level. For reasons that follow, we agree.

A. The 1944 consent decree adjudicating water rights of all users of Truckee River water does not establish the high watermark of Lake Tahoe for public trust purposes.

In a consent decree entered into in 1944, the level of Lake Tahoe was set at 6229.1 feet for purposes of adjudicating the water rights of all users of Truckee River water. (U.S. v. Orr Water Ditch Co. (U.S. Dist. Ct., Nev. 1944) Equity No. A3.) The Attorney General now argues the consent decree may be used to set the high level of the lake in this case. However, in 1957, the California Attorney General opined the consent decree could have no effect on the property rights of littoral property owners because they were not parties to the litigation. (30 Ops.Cal.Atty.Gen., supra, at p. 268.) We think the Attorney General had it right in 1957. The party against whom the plea of collateral estoppel or res judicata is asserted must have been a party or otherwise privy to the prior action. (F. W. Woolworth Co. v. Franchise Tax Bd. (1984) 160 Cal.App.3d 1154, 1160.)

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[7] Even assuming it is dictum we would be bound to follow it. (See County of Fresno v. Superior Court (1978) 82 Cal.App.3d 191, 194.)

Since such was not the case here, the consent decree has no effect on plaintiff's property rights.[8]

B. The state did not acquire any property rights by plaintiffs' "acquiescence" in public administrative agencies' use of 6229.1 feet above sea level as the high level of the lake.

As we have noted, the level of Lake Tahoe has never reached elevation 6229.1 feet since 1917. Nonetheless, the defendants note that correspondence and records maintained by the State Lands Commission reveal a widespread acceptance of 6229.1 feet as the lake's high watermark. Defendants also point to an affidavit by plaintiffs' counsel suggesting that the figure of 6229 feet is "generally accepted" as the high watermark. In addition, defendants note that the U.S. Army Corps of Engineers, the California Tahoe Regional Planning Agency and the bistate Tahoe Regional Planning Agency have consistently used that figure. Defendants conclude the widespread acceptance of the figure (6229.1 feet) compels the conclusion the figure has been established by "acquiescence" and is now binding on plaintiffs. We cannot agree.

We note, first of all, that in *Fogerty* our Supreme Court neither stated nor implied that it was of the view the littoral owners' land had been impressed with the public trust under a novel theory of "acquiescene." We do not read *Fogerty* as establishing some new theory by which the state acquires rights in private property. Indeed, what the court said in *Fogerty* was precisely the opposite—that the state's rights were obtained under the long-established doctrine of prescription. The state's proposed theory of "acquiescene" is therefore not "consistent with the views expressed" in *Fogerty*, as that case directs. (29 Cal.3d at p. 233.)

Moreover, if defendants' claim of "acquiescence" has any grounding in an established theory of property rights, it may be viewed as an assertion of an "agreed boundary." However, the assertion may not be maintained. The doctrine of agreed boundary is wholly insufficient to sustain the trial court's high watermark of 6229.1 feet.

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[8] We also note the consent decree litigated water rights, not property rights.

The elements required to establish an agreed boundary are well established. They are: (1) uncertainty as to the true boundary line; (2) an express or implied agreement between adjoining landowners to accept a line as the boundary; and (3) acceptance and acquiescence in the line for a period equal to the statute of limitations or until action is taken in reliance on the agreement which would result in substantial loss if the boundary were altered. (French v. Brinkman (1963) 60 Cal.2d 547, 551; Ernie v. Trinity Lutheran Church (1959) 51 Cal.2d 702, 707-709; see Humphrey v. Futter (1985) 169 Cal.App.3d 333, 338; Finley v. Yuba County Water Dist. (1979) 99 Cal.App.3d 691; 699; 3 Miller & Starr (rev. ed. 1977) § 21:27, pp. 552-559.)

The objects of the agreed boundary doctrine are to secure repose, to prevent strife and disputes concerning boundaries, and make titles permanent and stable. (Martin v. Lopes (1946) 28 Cal.2d 618, 623; 3 Miller & Starr, op. cit. supra, § 21:27, pp. 553-554.) The policy of the law is to give stability to agreements which the parties themselves undertake in good faith in an effort to settle an extant controversy. (Martin v. Lopes, supra, at p. 624.)

Where an extant controversy is absent the doctrine may not be applied. For example, the mere erection of a fence at a certain point does not establish a boundary if there is no dispute which the construction of the fence purports to resolve. (See Dooley's Hardware Mart v. Trigg (1969) 270 Cal.App.2d 337, 340.) Although the existence of a dispute may be inferred from long standing acceptance of a fence as a boundary (Ernie v. Trinity Lutheran Church, supra, 51 Cal.2d at p. 708), where there is direct evidence that no controversy existed the doctrine of agreed boundaries is inapposite. (Dooley's Hardware Mart v. Trigg, supra, 270 Cal.App.2d at pp. 340-341; 3 Miller & Starr, op. cit. supra, § 21:31, p. 562.)

Here, the agreed boundary doctrine is inapplicable because, at the time the figure of 6229.1 feet was established as a limitation on filling Lake Tahoe, and until recently, there was no extant controversy as to the boundary of public property rights, so no controversy was resolved. We know this, as a matter of law, because "with few exceptions, state authorities, including the

Attorney General, took the position until at least 1970 that by virtue of the provisions of [Civil Code] section 830 the state claimed ownership only to the low water mark. [Citations.]" (*Lyon*, supra, at p. 224.) The state first asserted claim to the lands at Lake Tahoe in 1977, whereupon this litigation was promptly filed. (*Fogerty*, supra, at p. 243.) Before the state's assertion of its claim in 1977, the owners had no reason to believe the figure of 6229.1 feet was anything more than a limitation on filling the reservoir. They had no cause to suspect it could have further significance as a property boundary for purposes of the public trust doctrine. The owners had no more reason to believe their property rights were being adjusted under the agreed boundary doctrine (by their acquiescence in a theoretical lake level of 6229.1 feet) than would the property owner who watches his neighbor build a fence on the neighbor's own land in order to comply with an ordinance requiring the construction of fences. (See Dooley's Hardware Mart v. Trigg, supra, 270 Cal.App.2d at pp. 339-340.) Thus, there was no controversy over property boundaries to be resolved by agreement. (*Id.*, at pp. 340-341.)

In the circumstances it would be manifestly unfair, if not disingenuous, to justify the imposition of public trust rights upon private owners' land on the basis that the owners, by their ignorance and inaction, somehow "agreed" to imposition of the public trust boundary at elevation 6229.1 feet. The trial court's high watermark may not be sustained under a theory of "agreed boundary."

C. The extent of the public trust must be established in accordance with a theory of prescriptive rights.

1. The doctrine of prescription will not support a high watermark of 6229.1 feet.

As we have noted, we read *Fogerty* as establishing that the People have acquired their public trust rights in the shorezone by prescription. Although the public trust may not be in all respects

identical to an easement,[9] we think the similarities are sufficient to justify resort to the law of prescriptive easements to set the upper boundary of the public trust. (See, e.g., Gilardi v. Hallam (1981) 30 Cal.3d 317, Gion v. City of Santa Cruz (1970) 2 Cal.3d 29, 41.)

Defendants contend a high watermark of 6229.1 feet has been established by prescription. However, we cannot agree.

"The elements necessary to establish a prescriptive easement are well settled. The party claiming such an easement must show use of the property which has been open, notorious, continuous and adverse for an uninterrupted period of five years." (Warsaw v. Chicago Metallic Ceilings, Inc. (1984) 35 Cal.3d 564, 570; Code of Civ. Proc., § 321.) The purpose of these requirements is to insure that the owner of the real property which is being encroached upon has actual or constructive notice of the adverse use and to provide sufficient time to take necessary action to prevent that adverse use from ripening into a prescriptive easement. (Twin Peaks Land Co. v. Briggs (1982) 130 Cal.App.3d 587, 593; Zimmer v. Dykstra (1974) 39 Cal.App.3d 422, 431.)

Unlike waters which actually lap upon the shore, a high watermark which exists only on paper and not on the land is not a "use" of the land at all, much less an "open" one. (See Warsaw v. Chicago Metallic Ceilings, supra, 35 Cal.3d at p. 570.) A "paper" high watermark—particularly one unaccompanied by the assertion of any effect on property rights—cannot fulfill the notice purpose underlying the elements of prescription. (Twin Peaks Land Co. v. Briggs, supra, 130 Cal.App.3d at p. 593; Zimmer v. Dykstra, supra, 39 Cal.App.3d at p. 431.) As the court of appeal has colorfully said, an adverse user " ' "must unfurl his flag on the land, and keep it flying, so that the owner may see, if he will, that an enemy has invaded his domains, and planted the standard of conquest." ' " (Wood v. Davidson (1944) 62 Cal.App.2d 885, 890.) To continue the metaphor, merely filing the blueprints for a flagpole over at the irrigation district offices or at the federal

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[9] Thus, for example, *Lyon* apparently establishes that the uses of land subject to the public trust are broader than actual uses of the land previously by the public. (See *Lyon*, supra, 29 Cal.3d at p. 229.)

courthouse with the thought that, someday, the flagpole might be built, is not the sort of notice to which the landowner is entitled. The trial court erred in concluding that 6229.1 feet was the high watermark.

2. Application of the doctrine of prescription results in a high watermark of 6228.75 feet above sea level.

Fogerty's doctrine of prescriptive rights is derived from cases allowing the public to obtain property rights from the actual incursion of dam waters upon the shore. (See *Fogerty*, supra, 29 Cal.3d at p. 248; State v. Parker (1918) 132 Ark. 316 [200 S.W. 1014, 1016]; State v. Sorenson (1937) 222 Iowa 1248 [271 N.W. 234, 238-239].) We shall therefore use the actual incursion of the waters to set the high level of Lake Tahoe. The question is: what is the appropriate level of actual incursion? Once again, we turn to the law of prescriptive easements for the answer.

"To acquire a prescriptive easement, the easement must be used in the required manner continuously and without interruption for the full prescriptive period [of five years]. The actual use required depends on the nature of the easement. It need not be used every day during the prescriptive period. The use is sufficient if it occurs on those occasions when it is necessary for the convenience of the user." (3 Miller & Starr, op. cit. supra, § 18:37, pp. 327-328.) "If a right of way over another's land has been used for more than five years, it is not necessary, to make good such use, that the claimant has used it every day. He uses it every day, or once in every week, or twice a month, as his needs require. He is not required to go over it when he does not need it, to make his use of the way continuous. The claimant is required to make such reasonable use of the way as his needs require." (Hesperia Land etc. Co. v. Rogers (1890) 83 Cal. 10, 11.)

In *Hesperia Land* our Supreme Court held that a user of a water ditch need not use the ditch year-round in order to satisfy the requirement of continuous use. It was sufficient that he used the ditch during the growing season and then only when he needed it. (*Ibid.*; see Twin Peaks Land Co. v. Briggs supra, 130 Cal.App.3d at p. 593.)

We find *Hesperia Land* directly analogous to the situation at bar. The need for water storage, like the need for water transportation in an irrigation ditch, fluctuates from season to season and ultimately from year to year. We believe it wholly unnecessary to the doctrine of prescription for water impounded behind a dam to remain in place continuously for the five-year period in order for prescriptive rights to attach. Practical experience tells us no reservoir operates that way. We believe, instead, that the needs of the reservoir operator are determinative. (Hesperia Land etc. Co. v. Rogers, supra, 83 Cal. at p. 11.) Where the reservoir operator returns the waters to a zenith each water year and maintains the water at that elevation for the duration of his needs his use of the reservoir is "continuous" up to and including that highest point. (*Ibid.*) For purposes of the public trust doctrine, we shall therefore set the high watermark of Lake Tahoe at the highest elevation actually reached by the "current" lake in five sequential years.

Applying this rule to the undisputed data contained in defendants' exhibit R is relatively straightforward. We must look to the lake's current conditions. (*Fogerty*, supra, 29 Cal.3d at pp. 248-249.) Thus, we consider the water levels after 1944 when the present mode of water level regulation was established. Examining defendants' exhibit R, we find that the five consecutive years of highest water since 1944 are years 1967, 1968, 1969, 1970, and 1971. In each of those five years, the lake has reached elevation 6228.75 feet.[10] This is a "continuous" use of the reservoir up to

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[10] The actual water levels were as follows:

1967	6228.87 feet
1968	6228.75 feet
1969	6229.05 feet
1970	6229.05 feet
1971	6228.99 feet

Needless to say, only the lowest of these five elevations has been reached *each* year.

Because the last year of the prescriptive period was 1971 we need not consider the effect, if any, of Civil Code section 1009 (effective 1972) which provides a means of protecting owners of private property who

that elevation for the purposes of prescriptive rights. (Hesperia Land etc. Co. v. Rogers, supra, 83 Cal. at p. 11.)

We acknowledge that the high watermark should be "ordinary" and should not represent the level reached by water in unusual floods. (*Lyon*, supra, 29 Cal.3d at p. 216; State v. Sorenson, supra, 271 N.W. at p. 236.) The undisputed data indicate the figure of 6228.75 feet is not markedly different from other elevations of the lake reached since 1944 and does not represent an inappropriate unusual condition of the lake.[11] We shall modify the trial court's judgment to establish the high watermark as 6228.75 feet above sea level, Lake Tahoe datum.[12]

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make their lands available to the public from later claims of prescriptive rights.

[11] For example, in years 1951, 1952, and 1953 the lake reached elevations 6228.89, 6228.79, and 6229.04 feet, respectively. Similarly, in years 1956, 1957, and 1958, the lake reached elevations 6229.04, 6229.07, and 6229.02 feet, respectively. In 1973, 1974, and 1975, the lake reached 6228.64, 6228.92, and 6228.64 feet, and in 1982, 1983, and 1984 the lake exceeded elevation 6228.50 feet.

[12] The parties have suggested various other methods that might be used to set the high level of the lake. However, none of the methods they suggest is consistent with the theory of prescriptive rights which provides the basis for the state's assertion of its public trust. (*Fogerty*, 29 Cal.3d at pp. 248-249.) We briefly summarize the proposed methods and their shortcomings.

The traditional method of ascertaining the high watermark in tidal waters is of little help. The height of the tides is determined primarily by the gravitational effects of the sun and the moon; these effects run one complete cycle every 18.6 years. The high tide is generally computed by averaging the high tides occurring over such a period of time. (Borax Consolidated v. City of Los Angeles (1935) 296 U.S. 10, 26-27 [80 L.Ed. 9].) This method is inconsistent with prescriptive rights obtained during a five-year period of time. Moreover, nontidal waters generally, and waters impounded behind a dam in particular, know of no tidal rhythmic regularity. Water stored in reservoirs, like that in uncontrolled lakes and streams, fluctuates with the weather but is also under the direct control of man. Thus, the 18.6 year average is of little utility.

Averaging the high watermarks set over a larger number of years is also inconsistent with the theory of prescriptive rights. Moreover, the

DISPOSITION

The judgment is modified to reflect that "the high watermark of Lake Tahoe constituting the uppermost limit of that lake subject to the public trust is located at 6228.75 feet above sea level, Lake Tahoe datum." As modified, the judgment is affirmed. (CERTIFIED FOR PUBLICATION.)

SIMS, J.

We concur:

BLEASE, Acting P.J.
CARR, J.

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method poses two additional problems: (1) determining the number of years over which to average (see, e.g., Willis v. United States (S.D. W.Va. 1943) 50 F. Supp. 99, 101-102; and (2) the danger that a landowner may have to endure excess encroachment in years of above-average waters.

Plaintiffs propose the method traditionally used in free-flowing rivers. The high watermark is defined as the place where the riverbed ends and the riverbank begins. (Howard v. Ingersoll (1851) 54 U.S. 381 [14 L.Ed. 189].) This method involves examining the riverbank to find the highest point where the water's flows have prevented the growth of vegetation. (See Harrison v. Fite (8th Cir. 1906) 148 F. 781, 783.) This method is premised on the assumption that the river will, over a period of time, predictably return to a certain level where it will leave an indelible mark upon its banks. This method is unacceptable for several reasons. First, resort to the physical characteristics of the riverbank is a method of ascertaining the historic levels of water where more accurate measurements are unavailable. Here, we have data accurate to two decimal points and need not rely on physical inspection of vegetation to tell how high the water has risen over time. Moreover, in a reservoir the water level is under the control of man and may fluctuate from month to month and from year to year in only a grossly predictable manner. Thus, the visible vegetation line may be a reflection of only recent events in the reservoir. We conclude the "vegetation test," like the mathematical averaging test, is unsuitable for present purposes.

Appendix B

Superior Court of the California
County of Placer

No. 48281

Charles F. Fogerty et al.,
Plaintiffs,

v.

State of California et al.,
Defendants.

Order for Entry of Summary Judgment in Favor of Defendants State Lands Commission and State of California

[Filed April 11, 1985]

The motion of defendants State of California and State Lands Commission for summary judgment or summary adjudication of issues without substantial controversy was heard by this Court in Department No. 3, before Honorable George Yonehiro, Judge, on April 1, 1985. Appearing as attorneys were Jan S. Stevens and David B. Judson for defendants and Edgar B. Washburn, Mary Beth Uitti for plaintiffs Charles F. Fogerty et al. and William T. Chidlaw for plaintiff Tahoe Shorezone Representation. After full consideration of moving and responding papers, all supporting papers including declarations, exhibits and discovery documents, all other documents filed herein, oral arguments of counsel, holdings of the California Supreme Court in *State v. Superior Court (Lyon)* (1981) 29 Cal. 210 and *State v. Superior Court (Fogerty)* (1981) 29 Cal. 240 and in accordance with the Peremptory Writ of Mandate issued by the California Supreme Court on October 3, 1983, which commands this Court to vacate its order of June 4, 1979, granting plaintiffs' partial summary judgment and to enter a new order granting the People's motion for partial summary judgment and partial judgment on the pleadings insofar as consistent with the views stated in that court's opinion filed March 20, 1981, the court finds that defendants have shown by admissible evidence and reasonable inferences therefrom and by judicial notice properly taken of those matters

requested by defendants in their moving papers, that there is no triable issue of any material fact remaining in this case and, therefore, defendants are entitled to judgment as a matter of law.

IT IS THEREFORE ORDERED that the order of this Court of June 4, 1979, granting plaintiffs' motion of March 1, 1979, for partial summary judgment is hereby vacated and defendants' motion for summary judgment filed herein on December 10, 1984, is granted and that judgment shall be entered in favor of defendants and against plaintiffs as follows:

1. Plaintiff landowners holding otherwise valid grants to the shores of Lake Tahoe hold to the low water mark thereof;

2. The title of littoral owners at Lake Tahoe is impressed with a public trust for commerce, navigation, fisheries and environmental preservation to the high water mark thereof;

3. The state may not be estopped from asserting the rights of the public to the high water mark at Lake Tahoe;

4. The high and low water marks at Lake Tahoe are to be determined in accordance with the current condition of that lake;

5. The low water mark of Lake Tahoe constituting the boundary between state sovereign ownership and upland fee ownership is located at 6223 feet above sea level, Lake Tahoe datum;

6. The high water mark of Lake Tahoe constituting the uppermost limit of that lake subject to the public trust is located at 6229.1 feet above sea level, Lake Tahoe datum;

7. Any right of the plaintiffs herein to pier out to the line of navigation in Lake Tahoe is subject to the authority of the State of California and its designees to impose reasonable regulations;

8. Plaintiffs holding property littoral to the bed of Lake Tahoe have not been deprived of the use or enjoyment thereof without compensation, contrary to the provisions of article 1, section 19, of the state Constitution and amendments V and XIV of the United States Constitution.

DATED: April 11, 1985

GEORGE YONEHIRO
Judge of the Superior Court

Appendix C

In The Supreme Court of the State of California

S.F. No. 24035

THE STATE OF CALIFORNIA et al., Petitioners v. THE SUPERIOR COURT OF PLACER COUNTY, Respondent; CHARLES F. FOGERTY et al., Real Parties in Interest.

[Filed Mar. 20, 1981]

OPINION

MOSK, J.—The present action is concerned with the ownership of lands between high and low water in Lake Tahoe, a navigable lake in which there is no appreciable ebb and flow of the tide. The primary issues are the same as those discussed in *State of California v. Superior Court (Lyon), ante,* page 210 [..... Cal.Rptr. ....., ... P.2d .....], but some questions in addition to those in the *Lyon* action are raised by the parties.

In the spring of 1977, the State Lands Commission, after being advised by the Attorney General that the state claimed ownership of the property between high and low water in navigable nontidal lakes and rivers, proposed to record claims to such lands in the offices of county recorders throughout the state.

Thereupon, Charles and Stella Fogerty and other owners of property along the shore of Lake Tahoe, and Tahoe Shorezone Representation, a corporation which represents many shoreline owners, filed this action for declaratory relief and inverse condemnation, and claimed violation of

their civil rights (42 U.S.C. § 1983).[1] The complaint alleged that plaintiffs owned the lands between high and low water in the lake in fee simple, that many of them had built piers or docks extending to low water, and that the state wrongfully asserted title or a public trust to high water. Plaintiffs sought an injunction to prevent the state from claiming any interest in the property between high and low water. As defendants in the action, they joined the state, the State Lands Commission, and several state officials (hereinafter called the People).

After overruling the demurrers of the People and granting plaintiffs a preliminary injunction prohibiting the state from recording a notice that it owns the lands between high and low water in Lake Tahoe, the trial court granted plaintiffs' motion for partial summary judgment. It ruled that no portion of the property involved in this action landward of the last natural low water mark of Lake Tahoe is or ever was sovereign property of the state or subject to the common law public trust for commerce, navigation and fishing, and it denied the motions for partial summary judgment and for partial judgment on the pleadings filed by the People. Thereafter, the People filed this proceeding, seeking a peremptory writ of mandate to direct the trial

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[1]Section 1983 provides: "Every person who, under color of any statute, ordinance, regulation, custom, or usage, of any State or Territory or the District of Columbia, subjects, or causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law, suit in equity, or other proper proceeding for redress. . . ."

court to vacate its order granting plaintiffs' motion, and to enter an order granting the motions made by the People.

The major issue raised by the plaintiffs, not discussed in *Lyon*, is that of estoppel. Strictly speaking, that issue is not formally before us. Plaintiffs' complaint pleads a cause of action for declaratory relief in estoppel, but their motion for partial summary judgment did not seek a ruling on this issue, and the trial court did not pass upon the question. The People, urging that plaintiffs should not be permitted to raise the issue, assert that estoppel is a question of fact for the trial court in any future proceeding. This argument is technically tenable. But if estoppel were to be determined on a case-by-case basis it would require a massive expenditure of time and money by the state, riparian landowners, and the judiciary. Such an effort may be avoided if, as we shall conclude, we can decide the question as a matter of law on the basis of the present record. (Cf. *City of Long Beach v. Mansell* (1970) 3 Cal.3d 462, 487-488 [91 Cal.Rptr. 23, 476 P.2d 423].)

The elements of equitable estoppel were described so thoroughly by Justice Sullivan in *Mansell* that little more need be said on the subject.[2]

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[2]There are four elements necessary to apply the doctrine: "(1) the party to be estopped must be apprised of the facts; (2) he must intend that his conduct shall be acted upon, or must so act that the party asserting the estoppel had a right to believe it was so intended; (3) the other party must be ignorant of the true state of facts; and (4) he must rely upon the conduct to his injury." (3 Cal. 3d at p. 489.)

We note that the opinion of the Attorney General referred to in *Lyon* declares that the public trust applies to the land in question (43 Ops.Cal.Atty.Gen. 288, 294 (1964)), and that it has long been

Since we find that one critical requirement for the application of the doctrine is absent, we need not discuss other aspects of the doctrine or their relevance to the present case. Estoppel will not be applied to the government if the result would be to nullify a strong rule of policy adopted for the benefit of the public (*Mansell*, 3 Cal.3d at p. 493), and we entertain no doubt that this would be the result if we were to hold that the People are barred from asserting the public trust in the lands at issue.

As we point out in *Lyon*, our decision will affect the rights of the public in 4,000 miles of shoreline along 34 navigable lakes and 31 navigable rivers, and many thousands of acres of land between high and low water (the shorezone). Amicus curiae in the *Lyon* action, the California Department of Water Resources, points out that the shorezone has been reduced to a fraction of its original size in this state by the pressures of development. Such lands now cover less than one half of 1 percent of the state; a further reduction by 15 percent was projected for 1980. Some authorities have warned that at the present rate of destruction nearly all riparian vegetation on the Sacramento River could be eliminated in the next 20 years.

The shorezone is a fragile and complex resource. It provides the environment necessary for the survival of numerous types of fish (including salmon, steelhead and

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settled in this state that the fact a private landowner has title to tidewaters does not establish such ownership is free of the interest of the public. (See, e.g., *People v. California Fish Co.* (1913) 166 Cal. 576 [138 P. 79].)

striped bass), birds (such as the endangered species: the bald eagle and the peregrine falcon), and many other species of wildlife and plants. These areas are ideally suited for scientific study, since they provide a gene pool for the preservation of biological diversity. In addition, the shorezone in its natural condition is essential to the maintenance of good water quality, and the vegetation acts as a buffer against floods and erosion.

The close relationship of the life forms in the shorezone to one another and to the condition of the bed of the stream or lake, the delicate balance among them, and the adverse effects of reclamation and development of these areas have been documented in numerous studies and reports. (E.g., U. S. Dept. of Agr., Forest Service (1973) Gen. Plan for Management of Nat. Forest Lands, Lake Tahoe Basin. Review Draft. Lake Tahoe Management Unit, South Lake Tahoe. pp. 1-2; Cal. Dept. Fish and Game (1974) Fish and Wildlife Res. of Anderson Marsh, Clear Lake, Lake County; Cal. Dept. Fish and Game (1966) 1 Fish and Wildlife Plan, p. 14.) One commentator has observed: "[T]he argument is now commonplace that these environments are the earth's most biologically productive . . . If nature bats last, wetlands may be the natural team's designated hitter." (*Nash, Who Loves a Swamp?* in Strategies for Protection and Management of Floodplain Wetlands, etc., a Symposium (USDA Forest Service, GTR-WO-12, Dec. 11-13, 1978.)) The recreational use of these areas for picknicking, hunting, fishing, hiking, birdwatching and nature study does not require elaboration to any Californian. In *Marks v. Whitney* (1971) 6 Cal.3d 251, 259-260 [98 Cal.Rptr. 790, 491 P.2d 374], Justice McComb made the following comment for a unanimous court regard-

ing the public uses of tidelands: "There is a growing public recognition that one of the most important public uses of the tidelands—a use encompassed within the tidelands trust—is a preservation of those lands in their natural state, so that they may serve as ecological units for scientific study, as open space, and as environments which provide food and habitat for birds and marine life, and which favorably affect the scenery and climate of the area." That observation is equally applicable to the shorezone.

The Legislature has recognized the value of the shorezone by enacting statutes calling for its protection. (Pub. Resources Code, §§ 5093.50, 5811.) Section 5811 provides that "the remaining wetlands of this state are of increasingly critical economic, aesthetic, and scientific value to the people of California, and . . . there is need for an affirmative and sustained public policy and program directed at their preservation, restoration, and enhancement, in order that such wetlands shall continue in perpetuity to meet the needs of the people."

We are not convinced by the assertion that these considerations do not rise to the level of a strong public policy in favor of retaining the public trust in the shorezone. Plaintiffs argue that a large percentage of the shoreline of Lake Tahoe is presently devoted to public use either because of public ownership or the public utilization of privately owned shoreline facilities such as marinas, that the problems at Lake Tahoe are related to a large influx of people which contributes to the pollution of the lake, that the public beach areas are overused and the

forest cover destroyed by motor vehicles, and that the best preserved areas of the lake are in private ownership. Thus, they urge, the public interest in preservation of the scenic beauty of the lake would be enhanced by private rather than public ownership of the shorezone. Moreover, it is argued, owners are limited in their use of the shorezone by many regulations designed to protect the ecology of the area,[3] and these are adequate to protect the public's interest.

Amicus curiae, the California Land Title Association, in a brief filed in the *Lyon* action, asserts that the People exaggerate the ecological importance of the shorezone since not all shorezone areas are of ecological importance, some of the most significant being located above high water or below low water. It is also argued that the imposition of a trust on behalf of the public will not necessarily provide the ecological benefits which the People envision. That goal can be better accomplished on a project-by-project basis in which ecological concerns can be dealt with and private improvements prohibited, lim-

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[3]For example, state law requires mitigation of adverse environmental effects of a project (Pub. Resources Code, § 21000 et seq.), development which will obstruct the flow of a river or lake or which uses material from a stream bed must be approved by the Department of Fish and Game to determine whether it will adversely affect fish and wildlife (Fish & G. Code, § 1603); the California Tahoe Regional Planning Agency has broad powers to enact ordinances for the regulation of improvement at the lake (Gov. Code, § 67100), and 10 percent of the wetlands in the state are protected by a law providing for the formulation of a plan to control development of Suisun Marsh (Pub. Resources Code, § 29000 et seq.).

ited, or modified, depending on the ecological needs of the area involved.

Whether or not the shorezone of Lake Tahoe would be better preserved if privately owned than if the public has an interest therein is not determinative, since we are not concerned here with recreation only, nor with Lake Tahoe alone, but with a principle which will apply to 4,000 linear miles along all the navigable lakes and rivers in California, in many of which the conditions may well differ in some respect from those at Lake Tahoe. Preservation of the public trust in the shorezone will allow the state flexibility in determining the appropriate use of such land, so that, for example, areas which are endangered by overuse can be closed to certain activities such as public bathing. A number of the considerations advanced by plaintiffs and amicus would call also for abdication of the tidelands trust and the substitution of regulation of tidelands development for the concept of the public's right to control such lands as a matter of right. These arguments appear to oppose the established public trust doctrine in principle, rather than its application to the shorezone as such.

The exercise of the police power has proved insufficient to protect the shorezone. The urgent need to prevent deterioration and disappearance of this fragile resource provides ample justification for our conclusion that the People may not be estopped from asserting the rights of the public in those lands.

One question remains: whether the boundary between public and private ownership should be determined with reference to Lake Tahoe in its current condition, or the

"natural" level of the lake as it existed prior to the construction of a dam in 1870, which had the effect of raising the level of the lake. (See 30 Ops.Cal.Atty.Gen. 262, 267-268 (1957).) The trial court concluded that the appropriate boundary between public and private ownership is to be measured in accordance with the "last natural" low water mark of the lake. Plaintiffs argue in favor of the trial court's ruling, while the People assert that the boundary should be fixed by assessing the lake in its current condition.

There is no direct authority on this issue in California. While there is authority relating to a landowner's right to accretions and relictions[4] and to the maintenance of a body of water at its existing level,[5] the issue in the present case revolves around rights in land between the natural water level of a lake and its current shoreline as raised by a dam constructed many decades ago. The People point

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[4]Section 1014 of the Civil Code provides that where land forms by imperceptible degrees from natural causes upon a river or stream by accumulation of material or the recession of the stream, it belongs to the owner of the bank. In *Carpenter v. City of Santa Monica* (1944) 63 Cal.App.2d 772, 794 [147 P.2d 964], the court refused to apply this statute to tidelands, deciding that artificial accretions to tidelands belong to the state, because to hold otherwise would indirectly convey public tidelands into private ownership.

[5]Some cases hold that a landowner has a vested interest in a long-continued diversion of water by the state if he has made substantial expenditures in reliance upon the diversion (*Natural Soda Prod. Co. v. City of L. A.* (1943) 23 Cal.2d 193, 197 [143 P.2d 12]; *Chowchilla Farms Inc. v. Martin* (1933) 219 Cal. 1, 18 [25 P.2d 435]), and that he may recover damages if the level of a lake is lowered (*City of Los Angeles v. Aitken* (1935) 10 Cal.App.2d 460, 472 [52 P.2d 585]).

out that it would be difficult (and probably impossible in some cases) to reconstruct the natural water level of a lake. There are hundreds of dams in California, some dating back to the early days of statehood. (Dept. of Wat. Resources, Dams Within Jurisdiction of State of Cal. (1976) Bull. No. 17-76.) The monumental evidentiary problem which would be created by measuring the boundary line between public and private ownership in accordance with the water level which existed prior to the construction of these dams provides a convincing justification for accepting the current level of the lake as the appropriate standard.

Moreover, the dam at Lake Tahoe has been in existence since 1870, long past the period required for the acquisition of prescriptive rights by the state in the lands in question. (Civ. Code, § 1007; Code Civ. Proc., § 325.) It has been held in other jurisdictions that a landowner loses ownership of property covered by water resulting from the construction of a dam if the condition has continued for the period required for the acquisition of prescriptive rights. (*State v. Parker* (1918) 132 Ark. 316 [200 S.W. 1014, 1016]; *State v. Sorenson* (1937) 222 Iowa 1248 [271 N.W. 234, 238-239].) *Sorenson* stated that in these circumstances "the artificial condition is . . . stamped with the character of a natural condition, and the title to the lands covered by the waters of the lake is deemed to have passed from private ownership to the same trust as that of lands covered by the waters of natural navigable lakes. The state, and private owners, as well, of lands affected by the artificial condition, may enforce the maintenance of that condition." (Cf. *Chowchilla Farms Inc. v. Martin*,

supra, 219 Cal. 1, 18; *Natural Soda Prod. Co. v. City of L. A., supra*, 23 Cal.2d 193, 197.)

We hold that, under all the circumstances, the trial court erred in its conclusion that the "last natural" low water mark of Lake Tahoe is the appropriate standard by which to measure the boundary between public and private ownership.

We emphasize, as we did in *Lyon*, that these plaintiffs may use the shorezone for any purposes which are not incompatible with the public trust. Landowners who have previously constructed docks, piers and other structures in the shorezone may continue to use these facilities unless the state determines, in accordance with applicable law, that their continued existence is inconsistent with the reasonable needs of the trust. In that event, both statute and case law require that plaintiffs be compensated for the improvements they have constructed in the shorezone. (Pub. Resources Code, § 6312; *Illinois Central Railroad v. Illinois* (1892) 146 U.S. 387, 455 [36 L.Ed. 1018, 1043, 13 S.Ct. 110]; *City of Berkeley v. Superior Court* (1980) 26 Cal.3d 515, 534 [162 Cal.Rptr. 327, 606 P.2d 362].)

Let a writ of mandate issue directing the trial court to vacate its order granting plaintiffs partial summary judgment, and to grant the People's motion for partial summary judgment and partial judgment on the pleadings, insofar as consistent with the views expressed above.

Bird, C. J., Tobriner, J., and Newman, J., concurred.

CLARK, J., Dissenting.—For the reasons stated in my concurring and dissenting opinion in *State of California v. Superior Court (Lyon)*, *ante*, page 210, [..... Cal.Rptr. .....,

..... P.2d .....], the public trust declared today by the majority applies only to tide and submerged lands and does not apply to the shorezone. While the shorezone at Lake Tahoe may be a ring around the lake only a few feet in width, shorezones on navigable streams encompass hundreds of square miles which are presently in productive use for other than trust purposes, and we should not at this late date declare such uses unlawful.

I must also dissent from the majority's conclusion that the People may not be estopped from asserting the trust. The holding of the sole authority relied on by the majority, *City of Long Beach v. Mansell* (1970) 3 Cal.3d 462 [91 Cal.Rptr. 23, 476 P.2d 423], is directly contrary to today's decision.

In *Mansell*, the City of Long Beach had claimed portions of a residential subdivision were tidelands subject to the trust. Estoppel was urged on the ground: "[T]he subject lands were filled and improved with the knowledge and acquiescence of the state and city and . . . since annexation of the area in 1923 the city has exercised full municipal jurisdiction over it—granting building permits, approving subdivision maps, constructing and maintaining streets and city services, collecting taxes." (*Id.*, at p. 487.)

This court first discussed estoppel as applicable to private parties in land title cases, concluding that the circumstances would be sufficient to estop private claims. The court continued: "It is settled that '[t]he doctrine of equitable estoppel may be applied against the government where justice and right require it. (*United States Fid. & Guar. Co. v. State Board of Equalization* (1956) 47 Cal.2d

384, 388-389 [303 P.2d 1034] and cases there collected.)' (*Driscoll v. City of Los Angeles, supra,* 67 Cal.2d 297, 306 [61 Cal.Rptr. 661, 431 P.2d 245].) (See generally 28 Am.Jur.2d, Estoppel and Waiver, §§ 122-133, pp. 782-802; 31 C.J.S., Estoppel, §§ 138-147, pp. 675-733.) Correlative to this general rule, however, is the well-established proposition that an estoppel will not be applied against the government if to do so would effectively nullify 'a strong rule of policy, adopted for the benefit of the public, . . . ' (*County of San Diego v. Cal. Water etc. Co.* (1947) 30 Cal.2d 817, 829-830 [186 P.2d 124, 175 A.L.R. 747], see also cases there cited.) The tension between these twin principles makes up the doctrinal context in which concrete cases are decided." (*Id.*, at p. 493.)

After lengthy discussion of the leading cases on the issue of estoppel against government, *Mansell* distilled the controlling rule: "After a thorough review of the many California decisions in this area, as well as a consideration of various out-of-state decisions, we have concluded that the proper rule governing equitable estoppel against the government is the following: The government may be bound by an equitable estoppel in the same manner as a private party when the elements requisite to such an estoppel against a private party are present and, in the considered view of a court of equity, the injustice which would result from a failure to uphold an estoppel is of sufficient dimension to justify any effect upon public interest or policy which would result from the raising of an estoppel." (*Id.*, at pp. 496-497.)

The court concluded that the great injustice to homeowners which would result from failure to uphold an

equitable estoppel against the state and city justifies the minimal effect upon public policy resulting from raising an estoppel. (*Id.*, at p. 501.)

The majority in the instant case rely upon the language quoted above that "an estoppel will not be applied against the government if to do so would effectively nullify 'a strong rule of policy, adopted for the benefit of the public, . . .'" The majority conclude that establishing trust rights to the shorezone is so important that the People may not be estopped as to thousands of linear miles of shorezone. (*Ante*, pp. .....)

The majority decision is arbitrarily contrary to *Mansell*. That case established that in appropriate circumstances the People could be estopped to assert the trust, when the resulting injustice would outweigh the public policy. There are no doubt, thousands of homeowners in cities of the Sacramento and San Joaquin Valleys, as well as other areas of the shorezone, in substantially the same position as were the homeowners in Long Beach. These homeowners, and thousands of farmers will suffer thousands of "great injustices," clearly outweighing the public trust loss in respect to individual lands. (3 Cal.3d at p. 501.)

While it would be a tremendous burden on the judicial system to determine in individual cases whether imposition of the trust involves "great injustice" outweighing trust detriment, the courts' business is the administration of justice. However burdensome the alleviation of "great injustice" may be, courts should not shirk their duty.

I would deny mandate.

Richardson, J., concurred.

Appendix D

In The Supreme Court of the State of California

[S.F. No. 23981, Mar. 20, 1981.]

THE STATE OF CALIFORNIA et al., Petitioners, v. THE SUPERIOR COURT OF LAKE COUNTY, Respondent; RAYMOND R. LYON et al., Real Parties in Interest.

OPINION

MOSK, J.—In *City of Berkeley v. Superior Court* (1980) 26 Cal.3d 515 [162 Cal.Rptr. 327, 606 P.2d 362], we reaffirmed the ancient doctrine that tidelands—lands between the lines of mean high tide and mean low tide—are owned by the public, that the state holds these lands in trust for the people for their use for commerce, navigation, fishing and other purposes, and that this trust interest is retained even if the title to tidelands has been conveyed to private persons, unless the conveyance has been made to promote the purposes of the trust.

The present case also concerns lands along the shoreline, but the issue here is the boundary between state and private ownership in non-tidal, navigable lakes and streams between high and low water, i.e., lands alternately covered and uncovered by water as the level of the lake rises and falls with the seasons. The Attorney General, representing the People, claims that these lands are owned by the state, which acquired title thereto by virtue of its sovereignty upon admission to the Union, that they have not been conveyed to the owners of the lands along the shoreline, and that even if such conveyances have been made, the

lands in dispute are subject to the trust described in *City of Berkeley.*

Raymond R. Lyon and Margaret L. Lyon, real parties in interest (hereafter called Lyon) own 800 acres along the shore of Clear Lake in Lake County, a navigable body of water with an area of about 64 square miles. The portion of the property involved in the present dispute consists of more than 500 acres of marshland at the southern end of the lake, known as the Anderson Marsh, most of which is covered by water at certain times of the year. Lyon's predecessors in interest purchased the property from the state under patents issued between 1850 and 1906. These grants did not specify the waterward boundary of the land conveyed. Lyon sought to develop the property and applied for a permit to repair a levee for the purpose of reclaiming a portion of the marsh. The Fish and Game Commission notified him that it could not process his application for a permit because the State of California claimed ownership of the portion of the marsh which extends below the high water mark.

Lyon filed an action against the state and various of its agencies,[1] seeking to quiet title to the marsh, and for declaratory relief. He relied, inter alia, upon section 830 of the Civil Code.[2] The section, which was adopted in 1872, provides "Except where the grant under which the land is held indicates a different intent, the owner of the

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[1]Lyon joined the Department of Fish and Game and the State Lands Commission in the action. The commission has jurisdiction over the beds of navigable waters owned by the state or in which the state has an interest. (Pub. Resources Code, § 6301.)

[2]All references are to the Civil Code unless otherwise noted.

upland, when it borders on tide-water, takes to ordinary high-water mark; when it borders upon a navigable lake or stream, where there is no tide, the owner takes to the edge of the lake or stream, at low-water mark; when it borders upon any other water, the owner takes to the middle of the lake or stream."

The People filed a cross-complaint to quiet title in the state to the portion of the Anderson Marsh between high and low water and for declaratory relief. The County of Lake intervened in the action in its capacity as grantee in trust of the state's interest in the lands underlying the lake. (Stats. 1973, ch. 639, § 1, p. 1165.) The county supported Lyon's claim that he owns the property to the line of low water.

Lyon, the county, and the People, all moved for partial summary judgment based on their respective claims. The trial court ruled in favor of Lyon and the county (hereafter sometimes collectively referred to as Lyon); it determined that no portion of the Anderson Marsh lying landward of the ordinary low water mark of Clear Lake is sovereign property of the state or subject to a common law public trust, but that the waters of the lake are impressed with a public servitude so that when the water rises above the low water mark, the public has the right to navigate between that line and the ordinary high water mark. The People seek a writ of mandate to compel the trial court to vacate its order, and to grant the People's motion for partial summary judgment.

The case involves issues which are of vast importance to the general public as well as to the owners of land bordering

upon navigable lakes and streams. The significance of these issues has generated extensive briefs by amici curiae,[3] and their analyses and arguments have been of considerable assistance to the court. No less than 4,000 miles of shoreline along 34 navigable lakes and 31 navigable rivers in the state are involved. Substantial areas of land will be affected by our decision: at Clear Lake alone, there is a difference of 5,000 acres in the surface area of the lake between high and low water, and the Anderson Marsh constitutes one-half of the remaining fresh water marsh at Clear Lake. Lands of the type involved in this proceeding constitute a resource which is fast disappearing in California; they are of great importance for the ecology, and for the recreational needs of the residents of the state.

Lyon's claim to the fee ownership of Anderson Marsh to the low water line is based on the following reasoning: California never acquired title to the beds underlying navigable nontidal waters above low tide. The United States Supreme Court has made it plain that the ownership of such lands is a matter of state rather than federal law. (*Hardin v. Jordan* (1891) 140 U.S. 371, 382 [35 L.Ed. 428, 433, 11 S.Ct. 808]; *Barney v. Keokuk* (1876) 94 U.S. 324, 338 [24 L.Ed. 224, 228].) The states exercised their options with regard to ownership of such land by adopting

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[3]The Department of Water Resources has filed an amicus brief in support of the People, as have the Sierra Club and the Natural Resources Defense Council (joint brief) and the Audubon Society and Friends of the Earth (joint brief). The California Land Title Association and the California Association of Realtors (hereafter referred to as California Land Title Association) have filed a joint brief on behalf of Lyon, and the Upper San Joaquin River Association also supports Lyon's position.

different rules; some states claim only to low water, some to high water, and others make no sovereign claim to the beds of nontidal bodies. Indeed, only a minority of states claim sovereign ownership to high water.[4] When California entered the Union, it determined to exercise no sovereign claim to the beds of nontidal navigable waters. This choice was made when, upon admission to statehood, the Legislature adopted a statute which provided that unless inconsistent with applicable federal or state law, the "Common Law of England shall be the rule of decision in all Courts of this State." (Stats. 1850, ch. 95, p. 219.) Under English common law, the sovereign made no claim to ownership of lands underlying nontidal waters. Therefore, by the adoption of the English common law, California made no claim to ownership of the beds of such waters. Subsequently, by the enactment of section 830 in 1872, the state determined to claim title only to low water.

The People contend, on the other hand, that California acquired title to the lands in question to the high water mark in its sovereign capacity upon statehood, citing, inter alia, *State Land Board v. Corvallis Sand & Gravel Co.* (1977) 429 U.S. 363, 370-371 [50 L.Ed.2d 550, 558-559, 97 S.Ct. 582]; *Barney v. Keokuk, supra*, 94 U.S. 324, 338. Moreover, argue the People, section 830 did not grant such lands to private persons because that provision only sets forth a rule for the construction of deeds and does not constitute a grant of sovereign land.

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[4]Approximately 20 states adopt a low water line for navigable lakes and rivers, a few allow private ownership to the middle of the water, and other jurisdictions have adopted different rules for lakes and rivers. Ten jurisdictions have adopted the high water rule. (See fn. 9 at p. , *post.*)

We consider, first, whether California acquired sovereign ownership in the lands between low and high water in nontidal, navigable lakes and rivers upon admission to the Union. If this question is answered in the negative, the People's claim to fee ownership of these lands cannot prevail. If, on the other hand, the state owned the property in question at the time of admission to the Union, it will be necessary to decide whether, by the enactment of section 830 in 1872, it granted an interest therein to riparian landowners and, if so, the extent of the interest conveyed.

We begin with the proposition that, even accepting Lyon's assertion that the state did not automatically succeed to title to the beds of navigable nontidal lakes and streams to high water upon statehood but only had the option to make such a claim, absent an indication that the new state declined to exercise sovereign ownership of such lands, we would be compelled to decide the issue in favor of the state's title. The only basis for a claim that California abdicated its rights to claim to high water in 1850 was the adoption of the common law of England as the rule of decision in this state.[5]

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[5]The disagreement between the parties in this regard appears to focus not upon the question whether the state had the power to grant these lands to private persons, but upon when such power was exercised, i.e., when California entered the Union or thereafter. The People urge that the state succeeded to the ownership of the lands in question to high water as an inherent aspect of sovereignty, although sovereignty implies that after admission to the Union the state had the power to grant them to private persons. Lyon argues, on the other hand, that California never owned these lands but only had the option to claim ownership, and when it was admitted to the Union, by the adoption of the common law in 1850 and section 830 in 1872, the state elected not to exercise its right to claim ownership of the land between low and high water.

In England, there were different rules concerning the ownership by private persons of the beds of tidal waters and nontidal waters. Nontidal rivers and lakes were privately owned; a riparian holder took to the middle of the lake or the thread of the stream, much like the landowner along a public street. At the same time, the beds of all navigable waters were said to belong to the crown, and the King held such property in trust for the public and could not dispose of it free of that trust. Only waters where the tide ebbed and flowed were considered to be navigable in England. The reason for the difference in these rules is readily explainable: in England there were no navigable streams of any importance beyond the ebb and flow of the tide. Therefore, the terms "navigable" and "tidal" became synonymous; tidal (navigable) waters came to mean public waters, while nontidal (and in England nonnavigable) waters came to mean private waters. (*The Propeller Genesee Chief et al. v. Fitzhugh et al.* (1851) 53 U.S. (12 How.) 443, 454-458 [13 L.Ed. 1058, 1063-1065]; *Barney v. Keokuk, supra*, 94 U.S. 324, 338.)[6]

Some of the original 13 states adopted the common law rule early in their history, for the same reason that the rule was appropriate in England, i.e., most of their waters were tidewaters, and until the use of steamboats "there could be nothing like foreign commerce upon waters with

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[6]The People contend that although the common law rule has generally been assumed to be as described above, there is some authority for the proposition that the tidal character of a body of water was not a critical factor in England in the determination of navigability. Numerous cases in addition to those referred to above support our characterization of the English rule. We need not discuss the authorities upon which the People rely, since we shall conclude that the common law test was not adopted in California.

an unchanging current resisting the upward passage." (*The Propeller Genesee Chief*, 53 U.S. at p. 455 [13 L.Ed. at p. 1063].) However, the English rule was obviously inappropriate as the nation expanded westward, where there were great rivers and lakes which were navigable in fact, even though they were not subject to the ebb and flow of the tide. These distinctions, and the inapplicability of the common law rules to conditions in much of the United States were recognized as early as 1851 by the United States Supreme Court. In *The Propeller Genesee Chief* it was held that the federal government had admiralty jurisdiction in rivers and lakes which were navigable in fact, whether or not the tide ebbed and flowed therein. In 1856, the courts of this state recognized that the tidal character of a body of water was not a proper test of navigability. (*American Water Co. v. Amsden* (1856) 6 Cal. 443, 446.)

The question of public ownership of navigable rivers and lakes was discussed in *McManus v. Carmichael* (1856) 3 Iowa 1. That case, which involved the boundary of public ownership along the Mississippi River, contains an exhaustive analysis of the common law rule of England and its application by early American courts. The court held that only those parts of the common law which were suitable to the conditions in Iowa were adopted by the new state. The opinion asks, rhetorically and somewhat floridly, "whether the rules and tests which are applicable enough to the rivulets of England, shall be taken to measure those waters whose flow is through the climates and zones of the earth?" (*Id.* at p. 31.) Needless to say, it held that the state owned the beds of navigable, nontidal bodies to

high water, and that the common law rule was inappropriate to the United States because the great nontidal rivers and lakes in this country are navigable in fact. Other states recognized the inapplicability of the English rule to conditions in this country prior to 1850. (E.g., *Carson v. Blazer* (Pa. 1810) 2 Binn. 475, 484-486; *Cates v. Wadlington* (S.C. 1822) 1 McCord 580, 582.)

In *Barney v. Keokuk, supra,* 94 U.S. 324, the high court considered the rule declared in *McManus,* and left no doubt the correct doctrine was laid down by that case, i.e., that the states own the beds of navigable, nontidal bodies to high water, and that the common law is inapplicable to conditions in the United States. Nevertheless, it held that states which had adopted the common law rule had the power to determine whether "as rules of property" it would be safe to change their adherence to the common law. After reaching these conclusions, the court made a statement upon which Lyon places great reliance: "If they [the states] choose to resign to the riparian proprietor rights which properly belong to them in their sovereign capacity, it is not for others to raise objections." (*Id.* at p. 338 [24 L.Ed. at p. 228].) Later cases repeated the proposition that the states are free to determine the ownership of lands below high water mark in navigable, nontidal lakes and streams. (*Hardin v. Jordan, supra,* 140 U.S. 371, 382 [35 L.Ed. 428, 433]; *Shively v. Bowlby* (1894) 152 U.S. 1, 40 [38 L.Ed. 331, 346, 14 S.Ct. 548].)

With this background, we consider whether we are compelled to conclude, as Lyon asserts, that by the adoption of the English common law in 1850, California accepted

the rule of private ownership of nontidal navigable waters so that title to their beds was never in the state but was granted directly to private riparian owners. We do not so conclude.

First, our courts have never adhered slavishly to common law doctrines if they were unsuitable to the circumstances of our people or if the conditions were those never contemplated by the common law. (*Van Ness v. Pacard* (1829) 27 U.S. (2 Pet.) 137, 143-144 [7 L.Ed. 374, 376-377]; *Jones v. California Development* (1916) 173 Cal. 565, 573-574 [160 P. 823].) *Crandall v. Woods* (1857) 8 Cal. 136, 142-143, referred to the English test of navigability as a rule "framed with special reference to the physical condition of a country differing widely from our own." The law is replete with situations in which this and other jurisdictions which adopted the common law have refused to follow those aspects which were unsuitable to local conditions. (See Traynor, *Statutes Revolving in Common-Law Orbits* (1968) 43 State Bar J. 509, 518 et seq.; Hall, *The Common Law* (1951) 4 Vand.L.Rev. 791, 805 et seq.) If we were to hold, as Lyon urges, that the adoption of the common law in 1850 signified the acceptance in this state of the English rule regarding the ownership of the lands in question, we would "apply a rule founded on a particular reason, to a case where that reason utterly fails." (*Crandall* at p. 143.)[7]

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[7]Lyon appears to argue that because *The Propeller Genesee Chief* was not decided until 1851, the year after California entered the Union, and *Barney* was not decided until four years after section 830 was enacted into law, the holdings of these cases may not be considered in deciding whether California, by adopting com-

Rejection of the common law rule is also supported by the enactment of section 830 in 1872. As we have seen, under English common law, a riparian landholder owned land beneath nontidal waters to the middle of the lake or the thread of the stream; the King had no ownership interest in such lands. Under the terms of section 830, according to Lyon, the boundary between public and private ownership was set at the low water line. If we were to accept Lyon's assertion, we would be led to the entirely irrational conclusion that, although California, by the adoption of the common law in 1850, granted fee title to lands beneath navigable nontidal waters to the center line, 22 years later it deprived riparian owners of their property to the center by the enactment of section 830, and decreed that henceforth they owned only to the low water mark.[8]

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mon law rules, intended to relinquish the state's right to claim ownership of the beds of navigable, nontidal waters. We cannot agree. These cases and many others (including some cases cited above decided before 1850) demonstrate that the common law rule regarding nontidal waters is inappropriate to conditions in this state. The concept that only common law doctrine applicable to local conditions has been incorporated into our law is as old as the state itself.

[8]*Wright v. Seymour* (1886) 69 Cal. 122, 127 [10 P. 323], is relied upon by Lyon for the proposition that section 830 merely codified the common law. It is true that the decision states the section is a "declaration of the law . . . as it has existed since the formation of our state government." However, this statement was made with reference to the portion of section 830 relating to tidal waters.

Lyon does not directly discuss the inconsistency between his assertions regarding the common law and the effect of section 830. He claims that the state "may have followed the English common law prior to 1872, and made no claims to the beds of non-tidal navigable waters," and that section 830 "finally resolved any uncertainty about prior common law rules in California." The problem with this approach is that it skirts the critical issue whether the state or

Finally, we observe that the jurisdictions which hold the high water line to be the boundary between private and public ownership have also adopted the common law as the rule of decision.[9] These cases demonstrate that there is an inconsistency between not accepting the English rule regarding the ownership of the beds of nontidal, navigable lakes and rivers and the adoption of the common law as the rule of decision.

The conclusion follows that California succeeded to the ownership of the beds of such waters upon its admission to the Union, to the high water mark.

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private persons owned the beds of navigable, nontidal bodies to high water between 1850 and 1872. If California followed the English common law, then private persons owned these lands to the center line and were deprived of their property between that line and low water by the enactment of section 830. If, as we conclude above, the common law rule was not adopted in this respect, then the lands were owned by the state to high water, at least until 1872. Amicus curiae California Land Title Association, recognizing this anomaly, asserts that enactment of section 830 amounted to an unconstitutional taking of lands of riparian owners between the center line and low water mark.

[9]Alaska (*State, Dept. of Natural Resources v. Pankratz* (1975) 538 P.2d 984, 988); Arizona (*State v. Bonelli Cattle Company* (1971) 107 Ariz. 465 [489 P.2d 699, 701-702], revd. on other grounds (1973) 414 U.S. 313 [38 L.Ed.2d 526, 94 S.Ct. 517], overruled in *Corvallis Sand & Gravel Co., supra*, 429 U.S. 363, 382 [50 L.Ed.2d 550, 565]); Arkansas (*Anderson v. Reames* (1942) 204 Ark. 216 [161 S.W.2d 957, 959]); Florida (*Martin v. Busch* (1927) 93 Fla. 535 [112 So. 274-283]); Idaho (*Gasman v. Wilcox* (1934) 54 Idaho 700 [35 P.2d 265, 266]); Kansas (*Siler v. Dreyer* (1958) 183 Kan. 419 [327 P.2d 1031, 1033]); Oklahoma (*State v. Nolegs* (1914) 40 Okla. 479 [139 P. 943, 946]); Oregon (*Brusco Towboat Co. v. State, By and Through Straub* (1977) 30 Ore.App. 509 [567 P.2d 1037, 1040, 1042]); Utah (*Provo City v. Jacobson* (1947) 111 Utah 68 [181 P.2d 213, 214]; Washington (*State v. Superior Court* (1912) 70 Wash. 442 [126 P. 945, 947]).

We next consider whether the Legislature granted the lands in question to private persons by the enactment of section 830 in 1872. We do not doubt that the state had the power to make such grants. (See, e.g., *State Land Board v. Corvallis Sand & Gravel Co., supra,* 429 U.S. 363, 375 [50 L.Ed.2d 550, 561]; *Barney v. Keokuk, supra,* 94 U.S. 324, 338; *Hardin v. Jordan, supra,* 140 U.S. 371, 382 [35 L.Ed. 428, 433].) The question is whether section 830 was intended to accomplish this result.

As we have seen, the section provides that "[e]xcept where the grant under which the land is held indicates a different intent, the owner of the upland, . . . when it borders upon a navigable lake or stream, where there is no tide, . . . takes to the edge of the lake or stream, at low water mark. . . ."[10] Section 830 was a part of the Field Code, and when it was enacted in 1872, the Legislature added section 670 as well as section 2077 of the Code of Civil Procedure. Section 670 provides that the state is the owner of "all land below the water of a navigable lake or stream. . . ." Section 2077 sets forth rules for construing conveyances in situations where the construction is doubt-

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[10]As originally enacted, the section did not contain the introductory clause. It read, "When land borders upon tide water, or upon water which constitutes an exterior boundary of the State, the owner of the upland takes to high water mark; when it borders upon a navigable lake where there is no tide, the owner takes to the edge of the lake at low water mark; when it borders upon any other water, the owner takes to the middle of the lake or stream." The statute was amended in 1874 to its present form. (Stats. 1873-1874, Amend. to the Codes, ch. 612, p. 220.) The People rely upon this change as indicating that the section was intended to set forth only a rule of construction.

ful. It provides that a deed to land bordering a navigable nontidal lake is to be construed as conveying the right of the grantor to low water mark.

The People urge that section 670 is a rule of property, and sections 830 and 2077 are rules of construction. They point out that section 830 contains no words of conveyance, such as "grant" or "quitclaim," and argue that to construe the section as a grant of thousands of linear miles of lands owned by the public would violate the rule that grants by the public to a private party are to be construed in favor of the public. (§ 1069; *People v. Centr-O-Mart* (1950) 34 Cal.2d 702, 703 [214 P.2d 378]; *Oakland v. Oakland Water Front Co.* (1897) 118 Cal. 160, 174-175 [50 P. 277].) Lyon claims, on the other hand, that section 830 constitutes a rule of property, and that by enactment of the section, the state granted to riparian owners the lands to low water.

The parties cite numerous cases in support of their respective positions as to the interpretation of the section. We have examined these cases, and we find that while they contain dicta, suggestions, and implications from which one side or the other may take comfort, none contains a direct holding on the question whether section 830 was intended to constitute a grant of property between high and low water in navigable lakes and rivers.

Lyon relies upon *Packer v. Bird* (1886) 71 Cal. 134 [11 P. 873]. In that case, the plaintiff claimed ownership of an island in a navigable portion of the Sacramento River, asserting that his patent extended to the thread of the stream, which included the island. The court held that his

title went only to the "edge of the stream" and did not include the island. The quoted words are obviously ambiguous, but Lyon, in support of the argument that the "edge of the stream" means low water, relies upon the briefs of the parties in the case, which discussed the import of sections 830 and 670. Reference in a brief to these statutes is insufficient to clarify the ambiguous language employed by the court.[11]

The case most favorable to the position of Lyon is the *City of Los Angeles v. Aitken* (1935) 10 Cal.App.2d 460 [52 P.2d 585]. There the court declared that the title of private landholders in a navigable nontidal lake extended to low water mark, citing section 830, and that the state was the owner below low water, citing section 670. However, the statement was dictum, since the only issue in the case was whether Los Angeles, which sought to condemn fee simple title to the littoral rights of landowners to maintain the natural level of the lake, could avoid payment of substantial damages because of the poor quality of the water for domestic use.[12]

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[11]*Packer* was affirmed by the United States Supreme Court, which also employed ambiguous language in its decision. (*Packer v. Bird* (1891) 137 U.S. 661, 672 [34 L.Ed. 819, 822, 11 S.Ct. 210].) Later decisions of the high court cited *Packer* for the proposition that the jurisdiction of California in nontidal navigable waters extends to high water. (*Hardin v. Jordan, supra,* 140 U.S. 371, 382-383 [35 L.Ed. 428, 433-434]; *Shively v. Bowlby, supra,* 152 U.S. 1, 44-45 [38 L.Ed. 331, 347-348].)

[12]Other cases relied upon by Lyon either make no reference to section 830 (*Maginnis v. Hurlbutt* (1920) 49 Cal.App. 460 [193 P. 606]; *Crews v. Johnson* (1962) 202 Cal.App.2d 256, 258 [21 Cal. Rptr. 37] [in a dispute between adjoining littoral owners at Clear Lake, the court stated that the parties conceded that private owner-

The People rely primarily on *Churchill Company v. Kingsbury* (1918) 178 Cal. 554 [174 P. 329]. In that case, the petitioner sought to compel the surveyor-general to perform acts preliminary to issuance of a patent for the lands between high and low water in Little Klamath Lake, which the court found to be navigable. The petitioner relied upon the terms of an 1893 statute in support of his claim. It was held that the statute did not authorize the issuance of the patent. In the course of its opinion, the court noted that the petitioner took the position that "the land is, in fact sovereign land of the state, and in this, we think it is clearly right." (178 Cal. at p. 558.) The statement was dictum, the court did not cite section 830, and Lyon points out that the briefs of the parties in the case did not bring the section to the attention of the court. (See also *People v. Morrill* (1864) 26 Cal. 336, 356.)

If the decisional law is ambiguous regarding whether section 830 constitutes a grant or a rule for the construction of deeds, the same cannot be said of the administrative interpretation of the provision. Lyon has produced a voluminous body of evidence demonstrating that, with few

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ship of the submerged lands extended to low water]) or refer to the section but do not discuss its meaning (*Craig v. White* (1921) 187 Cal. 489, 492 [202 P. 648] [the court cited § 830 for the proposition that patents issued by the federal government conveyed title to the patentees to "the actual margin of the lake"]; *Foss v. Johnstone* (1910) 158 Cal. 119, 130 [110 P. 294] [citing § 830 as setting forth "certain incidents attaching to lands bordering upon waters" in a case involving a nonnavigable pond].) In *United States v. Gossett* (9th Cir. 1969) 416 F.2d 565, 568-569, the court classified California as a low water jurisdiction, apparently based largely upon the disclaimer by California's Attorney General to ownership of the state above that line.

exceptions, state authorities, including the Attorney General, took the position until at least 1970 that by virtue of the provisions of section 830 the state claimed ownership only to the low water mark. (See 43 Ops.Cal.Atty.Gen. 291, 295 (1964); 30 Ops.Cal.Atty.Gen. 262, 269 (1957); 23 Ops. Cal.Atty.Gen. 306, 307 (1954); 23 Ops.Cal.Atty.Gen. 97, 98 (1954).) In 1970, the Attorney General reexamined this position, and reversed his opinion, and in the trial of a condemnation action involving the Feather River (People v. Shasta Pipe and Supply Co. (Sup. Ct. Butte Co., No. 37390), and in other actions thereafter, asserted that the state owned the land under navigable lakes and streams to high water. In 1977, the Attorney General advised the State Lands Commission of this position.

According to affidavits, the files of the State Lands Commission contain hundreds of letters stating or implying that the state's ownership extends waterward of the ordinary low water mark.

Finally, the Legislature has impliedly accepted the low water mark of Clear Lake as the boundary of the state's ownership. The state has conveyed to Lake County its title to Clear Lake, in trust. The language of the grant assumes that the state's interest is to low water mark. (Stats. 1973, ch. 639, § 1, p. 1165.)[13]

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[13]Section 1 of the statute, after granting to the county, in trust, the state's interest in Clear Lake, provides, "The low water mark for Clear Lake has not been determined, and such determination may have to be made by judicial adjudication. Subject to such later determination and for the purpose of the administration of this grant only, the low water mark shall be considered by the parties to this grant as being zero on the Rumsey Gauge." The Rumsey

We are aware of the rule that the administrative construction of a statute is not necessarily determinative (*Whitcomb Hotel, Inc. v. Cal. Emp. Com.* (1944) 24 Cal.2d 753, 756-757 [151 P.2d 233, 155 A.L.R. 405]), but we cannot ignore these long-continued and frequently expressed views to the effect that section 830 constitutes a grant to private persons of title to the beds of navigable, nontidal bodies to low water mark. It cannot be said that the statute is so clear and unambiguous that these expressions may be disregarded. In this connection, we note that two states which adopted a statute similar to section 830 as part of the Field Code, interpret their enactments as conveying title to riparian owners to the low water mark in navigable, nontidal waters. (Mont. Rev. Codes 1947, § 67-712; *Herrin v. Sutherland* (1925) 74 Mont. 587 [241 P. 328, 331, 42 A.L.R. 937]; N.D. Cent. Code, § 47-01-15; *Hoque v. Bourgois* (N.D. 1955) 71 N.W.2d 47, 52 [54 A.L.R.2d 633].)[14]

We conclude, therefore, that Lyon has title to the low water mark of Clear Lake.

Gauge refers to a method by which Captain George Rumsey established the level of Clear Lake. The intersection of zero on that gauge with an elevation of 1,318.65 feet may represent the low water mark of the lake.

[14]There is no merit in the argument of the People that because section 830 has been employed to construe deeds in disputes involving nonnavigable waters (*Hess v. Merrell* (1947) 78 Cal.App. 2d 896, 899-900 [178 P.2d 467]) and tide waters (*Lynch v. Kupfer* (1933) 134 Cal.App. 652, 656 [26 P.2d 33]), the provision cannot be viewed as a rule of property in nontidal cases. We find nothing inconsistent in the notion that the provision may state a rule of property and may also constitute a rule for the construction of deeds.

We come, then, to the question whether the grant of lands between high and low water made by section 830 to riparian landholders is free of the trust described in *City of Berkeley*. It is well settled that if the state holds these lands in trust for the benefit of the public, its conveyance of title to private persons does not necessarily free the property from the burden of the public trust. Instead, unless the conveyance is made for the purpose of promoting trust goals, the grantee takes title subject to the rights of the public. This was the holding in *City of Berkeley* and in *People v. California Fish Co.* (1913) 166 Cal. 576, 596 [138 P. 79].

In *City of Berkeley*, we were concerned with whether 22,299 acres of tidelands in San Francisco Bay, granted to private persons by deeds purportedly in fee, between 1868 and 1870, were subject to the tidelands trust. We answered this question in the affirmative. We observed that under the venerable doctrine of the tidelands trust, which had its origin in Roman law, tidelands are owned by the state in trust for the public, for their use for commerce, navigation, fishing, recreation, or for the purpose of preserving the property in its natural state. Grants of such lands to private persons are subject to the trust unless the conveyances are made to enhance trust purposes. We determined that the grants in question were not made for such purposes, and that in any event, the state was not empowered to make such vast grants to private parties in its role as trustee.

The holding of *California Fish* is similar. There it was decided that, although various statutes authorizing the alienation of tidelands into private ownership effectively

passed title, the grantees took subject to the rights of the public because the grants in question were not made for the purpose of promoting the aims of the trust.

Lyon and amicus California Land Title Association urge that there is not and never has been a doctrine that nontidal, navigable waters are subject to a public trust. Rather, they claim, such waters are impressed only with a "recreational or navigational easement" which allows the public to use only the waters, so that when they rise above low water mark, the public may use them for navigation or fishing, but the bed between low and high water belongs to the riparian owner and when the water recedes the public has no right to use of the land above the low water mark.

The People and supporting amici curiae rely upon article X, section 4 of the Constitution,[15] which provides for freedom of access to and the right of navigation upon waters that are navigable. They rely also upon numerous cases which declare that California owns the lands under navigable waters in trust, without distinguishing between tidal and nontidal bodies in this regard. (See, e.g., *Colberg, Inc. v. State of California* (1967) 67 Cal.2d 408, 416 [62 Cal.Rptr. 401, 432 P.2d 3]; *Boone v. Kingsbury* (1928) 206

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[15]This provision was adopted in 1879 as article XV, section 2. It states: "No individual, partnership, or corporation, claiming or possessing the frontage or tidal lands of a harbor, bay, inlet, estuary, or other navigable water in this State, shall be permitted to exclude the right of way to such water whenever it is required for any public purpose, nor to destroy or obstruct the free navigation of such water; and the Legislature shall enact such laws as will give the most liberal construction to this provision, so that access to the navigable waters of this State shall be always attainable for the people thereof."

Cal. 148, 189 [273 P. 797]; *People v. Gold Run D. & M. Co.* (1884) 66 Cal. 138, 151 [4 P. 1152].)

In our view, *Illinois Central Railroad Company v. Illinois* (1892) 146 U.S. 387 [36 L.Ed. 1018, 13 S.Ct. 110], which we described in *City of Berkeley* as the "seminal case on the scope of the public trust doctrine" (26 Cal.3d at p. 521), settled the issue. It held very clearly that the applicability of the public trust doctrine does not turn upon whether a body of water is subject to the ebb and flow of the tide, but upon whether it is navigable in fact.

Illinois Central involved a grant by the State of Illinois of 1,000 acres of the bed of Lake Michigan constituting the entire harbor of the City of Chicago, to the Illinois Central Railroad. The high court held that the grant was revocable, that the state held these lands in trust for the public, and that it was powerless to relinquish its rights as trustee. The opinion addressed itself specifically to whether the trust doctrine was inapplicable because there was no appreciable tide in Lake Michigan. It rejected this premise in the following unmistakable language: ". . . by the common law, the doctrine of the dominion over and ownership by the crown of lands . . . under tidewaters is not founded upon the existence of the tide over the lands, but upon the fact that the waters are navigable, tide waters and navigable waters . . . being used as synonymous terms in England. The public being interested in the use of such waters, the possession by private individuals of lands under them could not be permitted except by license of the crown, which could alone exercise such dominion over

the waters as would insure freedom in their use so far as consistent with the public interest. The doctrine is founded upon the necessity of preserving to the public the use of navigable waters from private interruption and encroachment, a reason as applicable to navigable fresh waters as to waters moved by the tide. We hold, therefore, that the same doctrine as to the dominion and sovereignty over and ownership of lands under the navigable waters of the Great Lakes applies, which obtains at the common law as to the dominion and sovereignty over and ownership of lands under tide waters on the borders of the sea, and that the lands are held by the same right in the one case as in the other, and subject to the same trusts and limitations." (146 U.S. at pp. 436-437 [36 L.Ed. at pp. 1036-1037].)

Lyon and amicus California Land Title Association insist that the holding of *Illinois Central* is confined to the Great Lakes, which are "special because of their size and importance in interstate commerce." While it is true that the opinion emphasizes the importance of the Great Lakes for commerce, the portion of the opinion quoted above makes it clear that it is navigability which is the touchstone in determining whether or not the public trust applies. The application of the trust doctrine to tidal waters is not confined to those bodies which are huge in size and important for purposes of commerce; we can see no reason why such a test should not be applied to nontidal waters. Nor does *Illinois Central* set forth a special rule relating to Lake Michigan. Other jurisdictions have recognized that the doctrine enunciated in that case applies to nontidal bodies which cannot be characterized as "inland

seas." (E.g., *State v. Southern Sand & Material Co.* (1914) 113 Ark. 149 [167 S.W. 854, 856]; *State v. Korver* (1914) 127 Minn. 60 [148 N.W. 617, 623]; *Flisrand v. Madson* (1915) 35 S.D. 457 [152 N.W. 796, 801]; *Hazen v. Perkins* (1918) 92 Vt. 414 [105 A. 249, 251 23 A.L.R. 748]; *State v. Public Service Commission* (1957) 275 Wis. 112 [81 N.W.2d 71, 73-74.)[16] It is noteworthy that South Dakota, like California, has adopted a provision similar to section 830 but, as *Flisrand* makes clear, the state has impressed a trust for public uses on the riparian owner's property between high and low water.

Another matter of interest in this connection is that an opinion of the California Attorney General relied upon by Lyon for the proposition that section 830 has been interpreted by state officials as setting a low water boundary for public ownership explicitly qualified this opinion by the statement that the riparian owner's title between low and high water is held in trust to preserve the rights of commerce and navigation for the public. (43 Ops.Cal. Atty.Gen., *supra*, 291, 294.)[17]

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[16]In support of this assertion, Lyon states that other navigable waters in Illinois, such as the Mississippi River, are owned by private parties. (Citing *City of St. Louis v. Rutz* (1891) 138 U.S. 226, 242 [34 L.Ed. 941, 947-948, 11 S.Ct. 337]; *Peoria v. Central Nat. Bank* (1906) 224 Ill. 43 [79 N.E. 296, 299].) In *Appleby v. City of New York* (1926) 271 U.S. 364, 395 [70 L.Ed. 992, 1004, 46 S.Ct. 569], it was said that although *Illinois Central* was "necessarily a statement of Illinois law," the general principle declared therein has been recognized throughout the country.

[17]The opinion states, "[U]pon its admission to the Union, California acquired title to all land below the high water mark of all navigable water within its territory, whether or not such water was tidal. This title is held in trust for the people of the State, in order

Our conclusion that the public trust is applicable to nontidal waters is also pertinent to the consideration of Lyon's argument, apparently accepted by the trial court, that as to the area between high and low water the public has an interest only in the water itself, so that it may use the water for boating and fishing, but when a lake or stream is at low water, the public has no right to use the bed to the high water mark. In *Marks v. Whitney* (1971) 6 Cal.3d 251, 259 [98 Cal.Rptr. 790, 491 P.2d 374], we held that, although early cases had expressed the scope of the public's right in tidelands as encompassing navigation, commerce and fishing, the permissible range of public uses is far broader, including the right to hunt, bathe or swim, and the right to preserve the tidelands in their natural state.

We see no justification in reason or authority for the proposition advanced by Lyon. In *People* ex rel. *Baker v. Mack* (1971) 19 Cal.App.3d 1040 [97 Cal.Rptr. 448], relied upon by Lyon as holding that the public interest in nontidal waters is confined to the waters themselves, the primary issue was the navigability of a section of the Fall River, which defendants had obstructed by erection of booms, fences and bridges, preventing plaintiff from boating, hunting and fishing in the stream. The court adopted a broad definition of navigability, holding that any waters which could be used for recreation were navigable and

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to preserve the right of commerce and navigation for the public. . . .

"There is no requirement that the state claim all land below high water mark. As long as the rights of the public are not impaired, the state may permit private ownership of land beneath non-tidal, navigable waters."

could be used by the public. In the course of its opinion, the court made the following statement, upon which Lyon relies: "[M]embers of the public have the right to navigate and to exercise the incidents of navigation in a lawful manner at any point below high water mark on waters of this state which are capable of being navigated by oar or motor-propelled small craft." (19 Cal.App.3d at p. 1050.)

We fail to see how Lyon can find comfort in this statement. It does not mean that the public's rights are confined to the waters as such, but merely attempts to distinguish between waters capable of commercial use—which were there claimed to be the test of navigability—and those capable of recreational use. Other cases cited by Lyon also fail to support his position.[18]

Nevertheless, argues Lyon, there is a sound reason in logic why tidal and nontidal waters should be treated

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[18]*Hitchings v. Del Rio Woods Recreation & Park Dist.* (1976) 55 Cal.App.3d 560 [127 Cal.Rptr. 830], was an action for declaratory relief to determine whether a certain portion of the Russian River was navigable. The court adopted the broad recreational use test of navigability set forth in *People* ex rel. *Baker v. Mack*, *supra*, 19 Cal.App.3d 1040, 1050, and held that the river was deemed in law to be navigable even though it was not in fact navigable for some part of the year.

In *Bohn v. Albertson* (1951) 107 Cal.App.2d 738 [238 P.2d 128], a tract of land was flooded when a levee broke. The flooding converted the land into a navigable body of water, upon which pleasure boats sailed and the public fished. It was held that the landowner could not charge the public for use of the water because while it was subject to recreational use it was a navigable body. However, the court held that the landowner had the right to reclaim the land since he had not lost title when it was suddenly flooded by the break in the levee, in accordance with the established rule governing avulsion.

differently insofar as these public's rights are concerned. He asserts that because tidelands are subject to inundation on a daily basis and nontidal waters are inundated only seasonally, tidelands are constantly subject to use for commerce, navigation and fishing, while the strip of land between low and high water in a nontidal body only useful for such purposes for a limited portion of the year. Therefore, he concludes, the necessity for impressing nontidal waters with the public trust is greatly reduced.

But this contention is predicated on an exceedingly narrow view of the purposes of the public trust. As Justice McComb pointed out for a unanimous court in *Marks v. Whitney, supra,* 6 Cal.3d 251, 259, the public's rights in tidelands are not confined to commerce, navigation and fishing, but include recreational uses and the right to preserve the tidelands in their natural state. We discern no valid reason why the scope of the public's right in nontidal waters should not be equally broad. Lyon's assertions in this regard imply the resurrection of the common law distinction between tidal and nontidal waters —a distinction which has been thoroughly discredited in this country. As was said in *Illinois Central,* when the United States rejected the English rule that admiralty jurisdiction was confined to tidewaters because it was inapplicable to the conditions in this country, "the limitation and all its incidents were discarded." (146 U.S. 387 at p. 436 [36 L.Ed. 1018 at p. 1036].) We hold that the same incidents of the trust applicable to tidelands also apply to nontidal navigable waters and that the public's interest is not confined to the water, but extends also to the bed of the water.

In *California Fish* it was held that a statute authorizing the conveyance of tidelands will not be interpreted to abandon the public trust unless no other interpretation is reasonably possible. Nothing in the language of section 830 requires a conclusion that riparian landholders take free of the public's rights in the lands between low and high water in navigable lakes and streams. We conclude, therefore, that Lyon's title to such lands is impressed with the public trust.

Lyon's final argument is that his ownership of the Anderson Marsh to low water free of the public trust is a "rule of property" and that a determination applying a trust to such property would accomplish a taking of private property in violation of federal and state constitutional provisions. He relies upon cases which recognize the protection of property rights afforded by the federal and state Constitutions. (*Board of Regents v. Roth* (1972) 408 U.S. 564, 577 [33 L.Ed.2d 548, 561, 92 S.Ct. 2701]; *Agins v. City of Tiburon* (1979) 24 Cal.3d 266, 273-274 [157 Cal. Rptr. 372, 598 P.2d 25]; *House v. L.A. County Flood Control Dist.* (1944) 25 Cal.2d 384, 391 [153 P.2d 950].) (4) (See fn. 19.) We doubt whether any failure of the state to previously assert its trust rights in the lands below high water (but see 43 Ops. Cal. Atty. Gen., *supra*, 291, 294) constitutes a "rule of property."[19]

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[19]In *Abbott v. City of Los Angeles* (1958) 50 Cal.2d 438, 456 [326 P.2d 484], a "rule of property" was defined as "A settled rule or principle, resting usually on precedents or a course of decisions, regulating the ownership or devolution of property. . . . The principle appears to be an extension of the '*stare decisis*' rule, which . . . seems to apply with peculiar force and strictness to decisions which

Indeed, in some respects, our holding constitutes less of an interference with property rights than occurred in *Illinois Central, California Fish,* and *City of Berkeley.* In those cases, the landowners had received outright grants from the state, purportedly in fee, while the title of Lyon to the lands in issue here is based only upon administrative interpretation of an ambiguous statute. In *Illinois Central* the high court held that the grant of the lands in question was revocable—not merely that the railroad held the property subject to the trust—on the ground that "[t]here can be no irrepealable contract in a conveyance of property by a grantor in disregard of a public trust, under which he was bound to hold and manage it." (146 U.S. 387, at p. 460 [36 L.Ed. 1018, at p. 1045].) And, in *California Fish,* in response to an argument by the grantees that the public should be estopped to claim any interest in the tidelands it had sold into private ownership, the court declared that the grantees had received title to the soil (subject to the public trust), and that they had "received consideration for their money, and it is to be presumed that they bought

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have determined questions respecting real property and vested rights. . . ."

Lyon's reliance on the "rule of property" which he espouses is open to question. The agreement under which he purchased Anderson Marsh provides that the seller does not warrant ownership of lands below zero mark on the Rumsey Gauge, and it makes provision to set aside some of the purchase monies in trust in the event a governmental body claims property above that point. Moreover, title insurance policies relating to the property except from coverage claims of the state to any portion of the property lying within the bed of the lake, any rights of the public for commerce, navigation or fishing, and any adverse claim to lands created by artificial means.

with knowledge of the law on the subject." (5) (See fn. 20.) In at least two jurisdictions in which the matter has been considered, the fact that the land between high and low water is owned by private parties is held not to prevent the imposition of the public trust to the high water mark. (*State v. Korrer, supra*, 148 N.W. 617, 623; *Flisrand v. Madson, supra*, 152 N.W. 796, 801.)[20]

We emphasize that Lyon is not deprived of the use of the lands between low and high water, and that he may utilize them in any manner not incompatible with the public's interest in the property.[21]

Let a writ of mandate issue directing the trial court to vacate its order granting Lyon partial summary judgment, and to grant the People's motion for partial summary judgment insofar as consistent with the views expressed above.

Bird, C. J., Tobriner, J., and Newman, J., concurred.

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[20]The People raise an additional question regarding the correctness of the trial court's ruling. The court determined that the appropriate boundary between public and private ownership is to be measured in accordance with the "last natural" ordinary low water mark of the lake, i.e., the water level in existence prior to the construction of a dam in 1914. The People argue that the proper standard of measure is the lake in its current condition. This issue is also presented in *State of California v. Superior Court (Fogerty)* (1981) *post*, at page 240 [—Cal.Rptr.—, —P.2d—], and it is discussed in the opinion in that case. We conclude that the position of the People is correct, and that the determination of the boundary between public and private ownership must be assessed in accordance with the shoreline of the lake as it exists presently.

[21]Lyon has moved to strike the People's "Replication to Answer to Petition for Writ of Mandamus" and an appendix to that brief. The People filed a motion to strike certain portions of the brief of amicus curiae California Land Title Association. These motions are denied.

CLARK, J., Concurring and Dissenting.—The majority opinion overwhelmingly establishes that by statute, case authority and practice California historically has not claimed title to land between the high and low water marks of inland bodies of water. I thus concur in the majority holding that Lyon has fee title to lands above the low water mark of Clear Lake.

However, I must dissent from the holding that lands lying along navigable streams and lakes between high and low water levels are subject to the tidelands and submerged lands trust. That trust should be limited to tidelands as its name implies—lands covered and uncovered by the flow and ebb of the tide—and submerged lands. Historically, the trust has not been applied to land between high and low water mark on navigable lakes and streams (the shorezone). To the contrary, millions of acres have been reclaimed between high and low water for residential, agricultural, and general governmental uses—uses which would have been and are improper if the trust doctrine is applicable. History establishes it would have been against public policy—greatly impeding the development of the resources of our state—to have applied the trust doctrine. To apply that doctrine for the first time today casts clouds on thousands if not millions of land titles and uses, and jeopardizes agricultural and residential uses of millions of acres which are presently so used and are far more valuable for farm and home than for trust uses. While public recreational and ecological uses of the shorezone are important considerations, the state has and is providing for such uses. Application of the trust to millions of acres historically and

presently within the shorezone is overkill, contrary to public policy, and an inequitable infringement on long-settled and vested titles.

I. The Trust

The common law trust at issue has repeatedly been described by our courts as applying to tide and submerged lands. (E.g., *City of Berkeley v. Superior Court* (1980) 26 Cal.3d 515, 518-519, fn. 1 [162 Cal.Rptr. 327, 606 P.2d 362]; *Marks v. Whitney* (1971) 6 Cal.3d 251, 257, fn. 1 [98 Cal. Rptr. 790, 491 P.2d 374]; *City of Long Beach v. Mansell* (1970) 3 Cal.3d 462, 482 [91 Cal.Rptr. 23, 476 P.2d 423]; *San Diego County Archaeological Society Inc. v. Compadres* (1978) 81 Cal.App.3d 923, 925 [146 Cal.Rptr. 786].) The Clear Lake lands now at issue are not tidelands—they are not daily covered and uncovered by the flow and ebb of tide water. (See *Marks v. Whitney, supra*, 6 Cal.3d 251, 258; *People v. Kerber* (1908) 152 Cal. 731, 733 [93 P. 878].) Unlike tidelands the instant shorezone is uncovered for long periods of time—often the better part of a year. Tidelands unlike the instant lands are covered and uncovered twice each day by salt water, which—unlike the waters of Clear Lake—severely limits use of underlying lands for agricultural purposes. The instant shorezone land is obviously not submerged land.

Before considering historical matters requiring rejection of the majority's extension of the trust to shorezones, we should first consider the trust as it applies to true tide and submerged lands.

Tidelands and submerged lands owned by the state are held in trust for public purposes of navigation, commerce and fisheries. (*City of Long Beach v. Mansell, supra,* 3 Cal. 3d 462, 482; *People v. California Fish Co.* (1913) 166 Cal. 576, 584 [138 P. 79].) Tidelands subject to the trust may not be alienated into absolute private ownership; an attempted conveyance of such land transfers "only bare legal title," and the property remains subject to the public trust easement. (*Id.*) The decisions of this court have established that the trust is a limitation on governmental as well as private reclamation activities. (*City of Long Beach, supra,* 3 Cal.3d 462, 482-486; *Atwood v. Hammond* (1935) 4 Cal.2d 31, 38 [48 P.2d 20]; *City of Oakland v. Williams* (1929) 206 Cal. 315, 327-328, 330-331 [274 P. 328].)

The uses permitted within the trust are described in *Marks v. Whitney* (1971) 6 Cal.3d 251, 259-260 [98 Cal.Rptr. 790, 491 P.2d 374], as follows: "Public trust easements are traditionally defined in terms of navigation, commerce and fisheries. They have been held to include the right to fish, hunt, bathe, swim, to use for boating and general recreation purposes the navigable waters of the state, and to use the bottom of the navigable waters for anchoring, standing, or other purposes. [Citations.] The public has the same rights in and to tidelands. [¶] The public uses to which tidelands are subject are sufficiently flexible to encompass changing public needs. In administering the trust the state is not burdened with an outmoded classification favoring one mode of utilization over another. [Citations.] There is a growing public recognition that one of the most important public uses of the tidelands—a use encompassed within the tidelands trust—is the preservation of those lands in their

natural state, so that they may serve as ecological units for scientific study, as open space, and as environments which provide food and habitat for birds and marine life, and which favorable affect the scenery and climate of the area. It is not necessary to here define precisely all the public uses which encumber tidelands."

Permissible uses of tidelands whether by government or private citizens are numerous within the broad terms of the public trust for navigation, commerce, fishing and other purposes. For example, in *City of Oakland v. Williams* (1929) 206 Cal. 315, 319-323 [274 P. 328], this court upheld the use of such lands by a private party for a warehouse to be used for shipping, processing, and packing dried fruits. (See *Atwood v. Hammond* (1935) 4 Cal.2d 31, 40 [48 P.2d 20].)

Nevertheless, there are certain common land uses which are not included within trust uses, namely, residential, agricultural, and general governmental. Individuals as well as government may enforce the trust. (*Marks v. Whitney, supra*, 6 Cal.2d 251, 261-262.)

Reclamation of tidelands does not in and of itself terminate the public trust. (*Marks v. Whitney, supra*, 6 Cal. 3d 251, 261; *City of Long Beach v. Mansell, supra*, 3 Cal. 3d 462, 483; *Newcomb v. City of Newport Beach* (1936) 7 Cal.2d 393, 402 [60 P.2d 825]; *Atwood v. Hammond* (1935) 4 Cal.2d 31, 40-41 [48 P.2d 20].) However, if the Legislature finds and determines that particular lands are no longer useful for trust purposes, it may free them from the trust. (*Marks v. Whitney, supra*, 6 Cal.3d 251, 260; *City of Long Beach v. Mansell, supra*, 3 Cal.3d 462, 482.)

Statutes purporting to terminate the public use will be carefully scanned to determine whether that was the legislative intent. (*City of Berkeley v. Superior Court, supra,* 26 Cal.3d 515, 525.)

II. The Shorezone Historically

We were taught in elementary schools that geographical conditions encountered by early settlers of our great California valleys were significantly different from those presently existing. Winter and spring rains and snows melting in the Sierras created great inland seas in the center of California. The width of rivers measured by feet in summer extended to miles during parts of the spring.[1] While the land regularly covered by water was as rich as any in the world, it could only be effectively farmed after the water receded. The flooding and short growing season limited production of crops and improvements which could be made.

---

[1]Historically, the Sacramento River has carried off the annual spring flow of seasonal rains and melting snows which arise in surrounding mountains. Large basins were formed as vast amounts of water regularly overflowed river banks. During spring seasons, the total basin covered 1,250 square miles and in extraordinary years 1,700 square miles. When spring flood waters evaporated, the most fertile and productive agricultural land was exposed. (See, Rep. of A Board of Engineers Upon Examination of Sacramento, San Joaquin, and Feather Rivers, Cal., H.R. Doc. No. 262, 59th Cong., 1st Sess., p. 6 (1905); Rolle, California: A History (1969) pp. 370-371.) Similarly, the Fresno River (*Miller & Lux v. Madera Canal etc. Co.* (1909) 155 Cal. 59, 63-64 [99 P. 502], and the San Joaquin River (*Herminghaus v. So. California Edison Co.* (1926) 200 Cal. 81, 87-88 [252 P. 607]) have traditionally overflowed during the spring time to produce large marshland areas, which were subsequently highly productive.

Much of the history of California is tied to reclamation and farming of the state's rich bottom land. Such reclaimed lands have become some of the world's most productive farmland. Other large areas of reclaimed land have been used for urban development. For example, much of Sacramento is built upon reclaimed land. (E.g., *Gray v. Reclamation District No. 1500* (1917) 174 Cal. 622, 626-631 [163 P. 1024] (Sacramento and Feather Rivers); *Miller & Lux v. Madera Canal etc. Co.* (1909) 155 Cal. 59, 67 et seq. [99 P. 502] (San Joaquin River); *Modoc L. & L. S. Co. v. Booth* (1894) 102 Cal. 151, 153 et seq. [36 P. 431] (Pitt River).)

In addition to tracts now protected from flood waters there remain large tracts that—while flooded in winter and spring—are naturally drained and farmed in the summer and fall. For example, the Yolo Basin, which is used during the annual runoff to reduce flood pressure on other areas (see, *Gray v. Reclamation District No. 1500, supra*, 174 Cal. 622, 631), is an area of many square miles and is put to productive farm use when the waters recede.

Similarly, not all homes built within the shorezones are free from regular flooding. Thousands of such homes remain, for example, along the Russian River. These shorezone homes are regularly flooded.

The acres of reclaimed land which have been put to productive agricultural and residential use numbers in the millions. So far as I am aware, the Legislature has never found or determined such reclaimed lands useless for trust purposes or free of the trust. Indeed, it is by no means clear the Legislature could have found or could

now find such reclaimed lands or even the greater portion thereof useless for trust purposes when we remember that among such purposes are recreational and ecological uses. While the lands may be extremely valuable for agricultural and residential purposes, a balancing of values is not the test under the trust doctrine. The test is lack of value for trust purposes. In addition, it must be pointed out that the government exacted a ransom of $783.500 to clear the title of the homeowners in the subdivision in the asserted tidelands area involved in *City of Long Beach v. Mansell, supra,* 3 Cal.3d 462, 475.

The history of development of our great agricultural valleys and related residential development is directly in conflict with the asserted common law trust the majority seek to impose.

The majority trust doctrine is not merely in conflict with the private assertion of fee interest to reclaimed lands, but it is abundantly clear the state has encouraged and provided for such uses. One need only examine the three volumes of West Publishing Company's Appendix to our Water Code to note the collection of statutes enacted by our Legislature to establish reclamation districts which were obviously designed to further private agricultural use of reclaimed lands. While such districts may have also furthered navigational purposes on the concerned bodies of waters, it would be unreasonable to conclude that assessments against reclaimed lands to finance the costs of reclamation did not reflect increased values of properties as agricultural lands or that reclamation districts were not created with the intent the lands were to be used for agri-

cultural purposes. Further, numerous municipalities in historical shorezone areas have approved subdivisions for residential development and have provided residential services, all of which activities are in conflict with the majority's trust.

In concluding that in the past 130 years there has been a public policy to maintain land in its natural state or to limit historical shorezones to trust uses, the majority blind themselves to the historical development of controlling law. This law recognizes what highly productive members of our society undertook to forge, not only to serve their needs but also to serve the needs of society with the authorization, approval and encouragement over the years of our Legislatures, Governors, and local governmental agencies.

Application of the trust doctrine to the shorezone is contrary to California public policy. Rather than precluding farming and residential use of the shorezone, the policy has been to encourage reclamation and farming and residential use of these properties.

Protection of parts of our historic shorezone for the purposes permitted by the trust is a worthy endeavor but it should not be accomplished with a blunderbuss that confiscates thousands—perhaps millions—of titles, and jeopardizes existing use of millions of acres of residential and farm lands. While, as the majority recognize (*State of California v. Superior Court (Fogarty)*, *post*, p. 240 [— Cal.Rptr. —, — P.2d —]), the state must compensate the landowner for improvements should it choose to exercise the trust and take property for park or other purpose.

it is not required to compensate for taking the land. From time immemorial landowners within the shorezone have conducted themselves in good faith as if they were owners in fee, and the land (apart from improvements) has been assessed and taxed as in the case of all fees not subject to the state's assertion of a right to take under a trust. To impose the trust at this late date on all property within the shorezone so that the state may take it without payment is confiscation and constitutionally impermissible.

In concluding that the trust doctrine must extend to the shorezone the majority rely mainly upon *Illinois Central Railroad v. Illinois* (1892) 146 U.S. 387 [36 L.Ed. 1018, 13 S.Ct. 110] where the Supreme Court held that a grant of *submerged* lands in Lake Michigan was subject to the trust. (*Id.*, at p. 452 et seq. [36 L.Ed. at p. 1042 et seq.].) The court expressly recognized that it did not impose a trust on the shorezone. It stated: "If it be ascertained . . . and determined that such piers and docks do not extend beyond the point of practicable navigability, the claim of the railroad company to their title and possession will be confirmed; but if they or either of them are found on such inquiry to extend beyond the point of such navigability, then the State will be entitled to a decree that they, or the one thus extended, be abated and removed to the extent shown . . ." (*Id.*, at p. 450 [36 L.Ed. at p. 1041].) The court's order was to the same effect. (*Id.*, at p. 464 [36 L.Ed. at pp. 1046-1047].)

Far from serving as authority to extend the trust to freshwater shorezones, *Illinois Central Railway* reflects it is *only* navigable submerged lands that are subject to the trust.

I would deny mandate.

Richardson, J., concurred.

Appendix E

Order Denying Review
After Judgment by the Court of Appeal
3rd District, Civil No. 25115

In the Supreme Court
of the State of California

In Bank

Fogerty et al.
v.
State of California et al.

Appellants' petitions for review DENIED.

LUCAS
Chief Justice

[Filed March 4, 1987]

Appendix F

In the
Court of Appeal of the State of California
in and for the
Third Appellate District

3 Civil C000163
Placer 48281

Charles F. Fogerty, Etc., et. al.
Plaintiff and Appellant

vs.

State of California, et. al.
Defendant and Respondent

REMITTITUR TO COUNTY CLERK

I, Wilfried J. Kramer, Clerk of the Court of Appeal of the State of California for the Third Appellate District, do hereby certify that the attached is a true and correct copy of the original opinion entered in the above entitled cause that has now become final.

Respondents to recover costs.

WITNESS my hand and the seal of the Court affixed at my office this 11th day of March 1987.

WILFRIED J. KRAMER, Clerk
By: Liston, Deputy

Appendix G

Superior Court of the State of California
for the County of Placer

Case No. 48281

Charles F. Fogerty, Stella Fogerty, Russell S. Grove,
Nancy J. Grove, et. al.,
Plaintiffs,

vs.

State of California; State Lands Commission
of the State of California, et al.,
Defendants.

As modified by the Third District Appellate Court, "the high water mark of Lake Tahoe constituting the uppermost limit of that lake subject to public trust is located at 6228.75 feet above sea level, Lake Tahoe datum". The judgment was otherwise affirmed.

DATED: May 6, 1987

GEORGE YONEHIRO
Judge of the Superior Court

Supreme Court, U.S.
FILED
JUL 29 1987
JOSEPH F. SPANIOL, JR.
CLERK

Nos. 86-1877, 86-1901

In The

Supreme Court of the United States

October Term, 1986

CHARLES F. FOGERTY, *et al.*,

Petitioners,

v.

STATE OF CALIFORNIA, *et al.*,

Respondents.

TAHOE SHOREZONE REPRESENTATION,

Petitioner,

v.

STATE OF CALIFORNIA, *et al.*,

Respondents.

ON PETITIONS FOR WRIT OF CERTIORARI TO THE COURT OF APPEAL OF THE STATE OF CALIFORNIA FOR THE THIRD APPELLATE DISTRICT

RESPONDENTS' BRIEF IN OPPOSITION

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QUESTIONS PRESENTED

1. Whether a state, having relinquished its fee title to the beds of non-tidal, navigable waters between low and high water, is prohibited by the United States Constitution from retaining a public trust interest therein.

2. Whether a substantial federal question is presented by a state court decision setting the high water mark on a navigable lake based on the lake's long-established current levels rather than some earlier, pre-regulated elevation.

3. Whether a state court's determination of high water mark on a navigable lake violates any federally-established rights of littoral owners in the absence of a showing that they have been denied any uses of the affected lands.

PARTIES

We concur with petitioners' enumeration of parties with one exception: The California Department of Fish and Game is not a party to this action.

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JURISDICTION

Petitioners in these cases seek to invoke this Court's jurisdiction under 28 United States Code section 1257(3) (1982). This Court lacks jurisdiction for at least two basic reasons.

1. Assuming petitioners' claims that the decisions of the courts below could give rise to an uncompensated "taking" in violation of the Constitution, California has not rendered a final determination of petitioners' rights that can give rise to a ripe taking claim under *Williamson County Regional Planning Comm'n v. Hamilton Bank,* 473 U.S. 172 (1985), and its progeny, *MacDonald, Sommer & Frates v. Yolo County* 106 S.Ct. 2561 (1986), and *First English Evangelical Lutheran Church v. County of Los Angeles,* 107 S.Ct. 2378 (1987).

2. Pursuant to *Oregon* ex rel. *State Land Board v. Corvallis Sand & Gravel Co.,* 429 U.S. 363 (1977), the Court of Appeal decision at issue merely applies state property law relating to the extent of public and private interests in California's navigable waters and their underlying beds, and thus does not present a substantial federal question. (See *Murdock v. City of Memphis,* 87 U.S. (20 Wall.) 590 (1875).)

———o———

CONSTITUTIONAL PROVISIONS AND STATUTES INVOLVED

The principal provision of the Constitution at issue is article III, section 2, clause 1, which provides in part:

> "The judicial Power [of the United States] shall extend to . . . Cases . . . [and] to Controversies. . . ."

The principal federal statutory provision at issue in this case is 28 United States Code section 1257 (1982), which provides in part:

> "Final judgments or decrees rendered by the highest court of a State in which a decision could be had, may be reviewed by the Supreme Court. . . ."

Also relevant is California Constitution article X, section 4 (1986), enacted in 1879 as article XV, section 2, prior to issuance of several of the grants in the instant cases, which in pertinent part provides:

> "No individual, partnership, or corporation claiming or possessing the frontage or tidal lands of a harbor, bay, inlet, estuary, or other navigable water in this State, shall be permitted to exclude the right of way to such water whenever it is required for any public purpose, nor to destroy or obstruct the free navigation of such water; and the Legislature shall enact such laws as will give the most liberal construction to this provision, so that access to the navigable waters of this State shall be always attainable for the people thereof."

STATEMENT OF THE CASE

These cases arise out of disputes over interests of the public, and private shoreowners, involving California's largest lake, Lake Tahoe. Originally, the parties saw the matters as winner-take-all boundary disputes. California, invoking her sovereign title to the beds of navigable, non-tidal lakes and rivers, claimed a high-water boundary, and full ownership rights up to that line. The shoreowners, petitioners herein, claimed the State did not have what it claimed because, among other reasons, California Civil Code section 830, passed in 1872, relinquished the State's interest between high and low-water. Both sides have lost on these broad claims. The California court held that the State's title to lands between high and low water had been given up, but that a public trust interest had been retained. Petitioners here attack the validity of the public trust doctrine on its face. This Court is asked to aid the

shoreowners in their battle to overturn the Supreme Court of California's balanced and middle path, one which has never been applied specifically to petitioners; which draws for its authority upon common law precepts well within the realm of petitioners' expectations; and which, on its face, only prohibits petitioners from developing Lake Tahoe however they please.

1. Lake Tahoe, California's largest lake, like all of California's navigable waters, has witnessed a crushing assault of development in recent years. (See *Lake Country Estates v. Tahoe Planning Agency,* 440 U.S. 391, 393, n. 2 (1979); *Tahoe-Sierra Preservation Council, Inc. v. Tahoe Regional Planning Agency,* 638 F.Supp. 126, 128-129 (D. Nev. 1986), appeal docketed, No. 86-2266 (9th Cir. July 3, 1987).)

2. Petitioners are owners of littoral lands bordering the lake, and trace their title to federal grants, some made after the passage of what is now article X, section 4 of the California Constitution. Neither the petitions for certiorari, nor the record in general, disclose exactly what petitioners do with their lands, what they want to do with them, or what they need to do with them to sustain reasonable and profitable use. (But see this Court's rule 21.5 1986).) They believe generally, however, that California's retained "public trust" interest in littoral property overlaps and exceeds "reasonable land use planning through adoption of zoning laws under the police power" (petition at 9), regardless of the different nature of the doctrine and how unobtrusive it may be in a particular case.

3. In 1977, the Attorney General of California sought to establish that the State owned in full every property interest in the lands underlying Lake Tahoe up to the high water mark, based on claims to the beds of navigable,

non-tidal lakes and rivers held by California by reason of her sovereignty. After the petitioners sued under both state law and 42 United States Code section 1983 to block the State Land Commission's attempt to record such claims in the offices of county recorders throughout California, the Supreme Court of California rejected the State's claims.

In its companion decisions in *State v. Superior Court (Fogerty I),* 29 Cal.3d 240, 247, 625 P.2d 256, 172 Cal. Rptr. 713, cert. den., 454 U.S. 865 (1981) (Petitioners' Appendix A-21) and *State v. Superior Court (Lyon),* 29 Cal.3d 210, 625 P.2d 239, 172 Cal.Rptr. 696, cert. den., 454 U.S. 865 (1981) (Petitioners' Appendix A-35), the state court held that although California had received the beds of its navigable waters to the high-water mark on statehood in 1850, the enactment of California Civil Code section 830 in 1872 should, in light of subsequent construction, be viewed as destroying the State's fee title between high and low water. (See *Lyon, supra,* 29 Cal.3d at 225-226.) The Supreme Court of California made clear that before the State could interfere in any manner with "previously constructed docks, piers and other structures in the shorezone" (*Fogerty I, supra,* 29 Cal.3d at 249), full and adequate compensation must be paid under both state and federal law.

4. At the same time, that court ruled that Civil Code section 830 showed no intent on the part of the Legislature, with respect to lands between low and high-water, to abrogate "the trust described in *City of Berkeley v. Superior Court,* 26 Cal.3d 515, 606 P.2d 362, 162 Cal.Rptr. 327, cert. den., 449 U.S. 840 (1980)." (*Lyon, supra,* 29 Cal.3d at 226.) *City of Berkeley* relied on a long line of California decisions, e.g., *People v. California Fish Co.,* 166 Cal. 576,

138 P. 79 (1913), which in turn found persuasive support in *Illinois Central Railroad Co. v. Illinois,* 146 U.S. 387 (1892).

5. The *Lyon* and *Fogerty I* decisions, from which these cases arise, reaffirm "that these plaintiffs [along Lake Tahoe's shore] may use the shorezone for any purposes which are not incompatible with the public trust" (*Fogerty I, supra,* 29 Cal.3d at 249 (citing *City of Berkeley*)), never stating whether *any* purpose petitioners in fact entertain was barred under state law. And prior California case law, not in any way limited by *Fogerty I,* recognized many uses compatible with the trust interest, including mineral exploration (*Boone v. Kingsbury,* 206 Cal. 148, 273 P. 797 (1928), appeal dism. and cert. den., 280 U.S. 517 (1929)), and the construction of additional docks, wharves, motels, restaurants, shopping complexes, and, even, parking lots. (*Martin v. Smith,* 184 Cal.App.2d 571, 7 Cal.Rptr. 725 (1960).) Petitioners sought certiorari. This Court denied review. (*Lyon v. California,* 454 U.S. 865 (1981).)

6. To determine the high-water mark for Lake Tahoe, and hence the potential reach of the public trust doctrine, the Supreme Court of California was required to decide between petitioners' claim for "the 'last natural' water mark of the lake," and the State's claim that "the boundary should be fixed by assessing the lake in its current condition." (*Fogerty I, supra,* 29 Cal.3d at 247-248.) The state court adopted the "current level" test, noting that petitioners' expectation interests in the "natural" level had been eroded over a period of a century by the dam in the Truckee River, into which Lake Tahoe empties, now ad-

ministered by the United States pursuant to the Newlands Reclamation Project. (See *Nevada v. United States,* 463 U.S. 110 (1983).)

7. The Court of Appeal decision of which petitioners complain (*Fogerty v. State,* 187 Cal.App.3d 224, 231 Cal. Rptr. 810 (Cal. App. 1986) (*Fogerty II*) (Petitioners' Appendix A-1) simply implements the 1981 California Supreme Court ruling with respect to fixing the high-water mark, without passing on any of the uses that may be "incompatible with the public trust." The Court of Appeal declared the high-water mark to be located at the highest elevation actually reached by the lake in five sequential years, the period required for the acquisition of prescriptive rights in California. Other than the fixing of this upper boundary at 6,228.75 feet above sea level, nothing has changed since this Court denied review in 1981. No actions for injunctive relief have been brought by the Attorney General, or anyone else; motorboats still pull up to the docks at Lake Tahoe; private residents, so far as the record discloses, still exclude the public generally from their property by the usual signs, fences, hedges, and lawsuits for trespass and ejectment. Consistent with planning schemes administered by local government and the bi-state regional planning agency, as well as regulation of the U.S. Army Corps of Engineers, land use in the shorezone continues unaffected by these decisions.

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REASONS FOR DENYING THE WRIT

INTRODUCTION

Comparison of the record in this case with the factors that counsel plenary review under the certiorari jurisdiction show that this case is completely unworthy of this Court's limited resources. Even assuming that petitioners' theory of "judicial takings" may have merit in "extreme case[s]" (Petition at 16), no such "dramatic result" (*id.*) is at issue here. All the Supreme Court of California has done is tentatively recognize that lands below the current high-water mark in Lake Tahoe are *potentially* subject to judicially-fashioned trust interests, all of which may be curtailed or adapted to dovetail with private needs (and even wants). Unless this Court is ready to abandon its well-entrenched rules against consideration of broad facial challenges under the Takings Clause (rules which have been reiterated every term since review was last denied), or desires to overrule its considered opinion in *Oregon* ex rel. *State Land Board v. Corvallis Sand & Gravel Co., supra,* 429 U.S. 363, there is no proper federal question on this record. Either the petition must be dismissed for want of a final judgment, per *San Diego Gas & Electric Co. v. San Diego,* 450 U.S. 621 (1981), or the writ should be denied under the reasoning of *MacDonald, Sommer & Frates v. Yolo County, supra,* 106 S.Ct. 2561.

Because petitioners are essentially challenging the public trust doctrine on its face, they confront an "uphill battle" on an "especially steep" slope. (*Keystone Bituminous Coal Ass'n v. DeBenedictis,* 107 S.Ct. 1232, 1247 (1987).) In such cases, this Court "properly refuses to look into the possibility that harsh results [will occur]." (*Connally v. Pension Benefit Guaranty Corp.,* 106 S.Ct.

1018, 1032 (1986) (O'Connor, J., concurring).) As this Court noted this past term, "[a] facial challenge . . . is, of course, the most difficult challenge to mount successfully, since the challenger must establish that no set of circumstances exists under which the [law] would be valid." (*United States v. Salerno,* 107 S.Ct. 2095, 2100 (1987).) Petitioners gain nothing by pointing out that trust interests may be implicated in over 4,000 miles of California shorezone. To use this case as a vehicle for aborting state court processes yet to be had with respect to thousands of parcels is just one more factor counseling against review. As in *Moore v. Sims,* 442 U.S. 415 (1979), here "the broader the challenge, the more evident [petitioners' ripeness problem] becomes." (*Id.,* at 428.)

Nor should it be of any concern to this Court that the instant judgment would be final if, for example, petitioners complained of a breach of procedural due process during the appellate process (*cf. Evitts v. Lucey,* 469 U.S. 387, 393 (1985)), instead of a violation of the Takings Clause arising out of the substantive decisions of the California courts. For this court has long recognized that when "further proceedings are necessary to resolve the federal question whether there has been a taking at all," this Court has no jurisdiction under 28 United States Code section 1257 (1982). (*San Diego Gas & Elec. v. San Diego, supra,* 450 U.S. at 633.) Likewise, when for purposes of its own procedure a state court has dismissed a taking claim without prejudice to its renewal following further proceedings under the finality rule, this court has treated such decisions as "final" for purposes of section 1257, but has affirmed on the ground that the answer to whether "property has been taken" is still unknown. (*MacDonald, supra,* 106 S.Ct. at 2568-2569.) These "normal delays" in litiga-

tion are simply not takings (*First English, supra,* 107 S.Ct. at 2389), and adjudication in this Court is thus precluded by "the very nature of the inquiry required by the Just Compensation Clause." (*Williamson County, supra,* 473 U.S. at 190.)

Here, California's courts, as is their right, have bifurcated the inquiry over the public trust interest in the Lake Tahoe shorezone. The first part of the litigation, recognizing that such an interest may be asserted, is over and is probably final for purposes of section 1257, just as the state court judgment in *MacDonald* was final. The second, and crucial part of the case, concerning whether and how the public trust will be applied, has yet to commence for the basic reason that no one has sought to invoke the trust. Petitioners have not been harmed any more than any landowner is harmed by the passage of a general zoning or regulatory law for which variances and exemptions can be obtained. Indeed, because no one has asserted a trust interest, petitioners are harmed a lot less. The suggestion that this Court's scarce resources are needed at this time to save petitioners from the Supreme Court of California is wholly fanciful. This case is in exactly the posture of the *MacDonald* and *Williamson County* cases as well as *United States v. Riverside Bayview Homes, Inc.,* 106 S.Ct. 455 (1986) and *Hodel v. Virginia Surface Mining and Reclamation Assn.,* 452 U.S. 264 (1981). It should for this reason be rejected for review, just as this Court has rejected similar claims that the courts of our sister states have unlawfully "taken" property by judicial decree. See *Ariyoshi v. Robinsion,* 106 S.Ct. 3269-3270, on remand, 796 F.2d 339 (9th Cir. 1986).

More fundamentally, petitioners' protests notwithstanding, granting review in this case would only plunge

this Court into a swamp that not even the most activist Justices of the *Lochner* era would have entered. No one disputes that state courts are subject to the strictures of the Fourteenth Amendment, but it would be astonishing if the rulings of the Supreme Court of California on matters as vital to California's sovereignty as the status of the beds underlying its navigable waters could provide "an appropriate vehicle for a needed declaration that the Constitution still protects real property against expropriation." (Petition at 17.) At worst, and giving our state courts *no* deference on matters of local property law, this case only reflects high-stakes litigation of the kind that often takes place in state courts, but which this Court, for many reasons, does not, and should not, review under article III and 28 United States Code section 1257(3).

1. THE STATES RECEIVED THE BEDS OF THEIR NAVIGABLE WATERS TO HIGH WATER MARK ON THEIR ADMISSION TO THE UNION. STATE LAW DETERMINES THE NATURE AND EXTENT TO WHICH THESE LANDS MAY BE SUBSEQUENTLY TRANFERRED

A. State Law Governs The Disposition Of Sovereign Lands

California acquired the beds of all her navigable waters on statehood under the constitutional equal footing doctrine. (*Oregon* ex rel. *State Land Board v. Corvallis Sand & Gravel Co., supra,* 429 U.S. 363.) It was clear early on that the navigable waters acquired by the states were all waters navigable in fact, and not merely tidal waters. (See *Packer v. Bird,* 137 U.S. 661, 670 (1891).) See also *Colberg v. State of California,* 67 Cal.2d 408, 423, 62 Cal. Rptr. 401, 432 P.2d 3 (1967), cert. den. 390 U.S. 949 (1968).

The initial landward boundary of these sovereign lands is fixed by federal law. (*Oregon* ex rel. *State Land Board v. Corvallis Sand & Gravel Co., supra,* 429 U.S. 363 at 376.) And that initial boundary, under federal law, is high water. (*Barney v. Keokuk,* 94 U.S. 324, 338 (1876); see Solicitor's Opinion, Department of Interior, 25 L.D. 510, 511 (1897); *Shively v. Bowlby,* 152 U.S. 1, 42-43 (1893); *Martin v. Waddell,* 41 U.S. (16 Pet) 367 (1842); *Pollard's Lessee v. Hagen,* 44 U.S. (3 How) 212 (1845); *Bowman's Devisees v. Wathen,* 2 McLean 382 (1842). The extent of public and private rights in a state's navigable waters, thereafter, is to be determined by state law. (*Barney v. Keokuk, supra,* 94 U.S. 324; *Oregon* ex rel. *State Land Board v. Corvallis Sand & Gravel Co., supra,* 429 U.S. 363.) The established law in California, as in many other states (see Sax, The Public Trust Doctrine in Natural Resource Law: Effective Judicial Intervention, 68 Mich. L.Rev. 471 (1970); 1 Clark, Waters and Water Rights, § 36.4(A), pp. 196-197 (1967 ed.); Althaus, Public Trust Rights, U.S. Dept. of Interior (Nov. 3, 1978)), is to the effect that, absent clear and express indications of legislative intent, the courts will not construe a grant of sovereign lands as extinguishing the public easement for commerce, navigation and fisheries with which such lands are impressed. (E.g., *People v. California Fish Co., supra,* 166 Cal. 576; *Forestier v. Johnson,* 164 Cal. 24, 127 P. 156 (1912); *City of Oakland v. Oakland Water Front Co.,* 118 Cal. 160, 50 P. 277 1897).) Indeed, a State attorney general's opinion relied on by petitioners expressly states that all lands below navigable waters, whether tidal or non-tidal, are held in trust to the high-water mark. (43 Ops.Cal.Atty.Gen. 291, 294 (1964).) Accordingly, the ruling of the California Supreme Court that the 1872 Legislature had passed the State's fee title to riparian owners but had failed to terminate the

public trust interests to high-water in *Fogerty I* was wholly predictable and consistent with settled principles of state law.[1]

This rule is not peculiar to California. It was enunciated by the New Jersey court as early as 1821 in *Arnold v. Mundy*, 6 N.J.L. 1 (1821), and first recognized by this Court in *Martin v. Waddell, supra*, 41 U.S. (16 Pet) 367, 409-413. A thorough discussion of the principles underlying it was undertaken by this Court in *Illinois Central Railroad v. Illinois, supra*, 146 U.S. 387.[2] More recently the Supreme Court of Florida confirmed public rights to navigable waters irrespective of whether the beds have

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1. Indeed the court's ruling reflects a retraction of a state rule that was originally much more harsh. Early California cases held that grants of sovereign trust lands made without express legislative authorization were totally void. (E.g., *People v. Kerber*, 152 Cal. 731 (1908); *Kimball v. MacPherson*, 46 Cal. 103 (1873); *Taylor v. Underhill*, 40 Cal. 471 (1871).)

Later cases, represented by *People v. California Fish Co., supra*, 166 Cal. 576, construed such grants to be valid, but subject to a retained public trust interest. This was the holding in *Lyon* and *Fogerty I*.

2. Although *Illinois Central Railroad v. Illinois, supra*, 146 U.S. 387, described variously as the "lodestar" of public trust law (Sax, *supra*, at 489), and the "seminal case" in this field (*City of Berkeley v. Superior Court, supra*, 26 Cal.3d at 521), was approvingly cited in the *Lyon* decision for the proposition that state sovereign lands remain subject to the public trust (*State v. Superior Court (Lyon), supra*, 29 Cal.3d at 227), neither *Lyon* nor *Fogerty I* treats *Illinois Central* in any way other than what it is: an eloquent expression of the common law rule that state sovereign lands are impressed with a near-inalienable public trust, and that grants of such lands remain impressed with the public trust.

This construction makes it unnecessary to discuss petitioners' startling suggestion that the *Illinois Central* opinion was somehow reversed by *Oregon* ex rel. *State Land Board v. Corvallis Sand & Gravel Co., supra*, 429 U.S. 363. (*Fogerty* petition, p. 11, n. 7.) *Illinois Central* may have been a pre-Erie decision, but nonetheless it applied Illinois law. (See *Appleby v. New York*, 271 U.S. 364 (1926).)

been transferred into private ownership. (*Coastal Petroleum Co. v. American Cyanamid Co.*, 492 S.2d 339 (1986), cert. den. sub nom. *Mobil Oil Corp. v. Board of Trustees*, 107 S.Ct. 950 (1987).)

Its application to nontidal, as well as tidal, navigable waters in California is beyond question. Long before the *Lyon* and *Fogerty I* decisions, the California court held in 1884, with reference to the Sacramento and American Rivers:

> "The State holds the absolute right to all navigable waters and the soils under them, subject, of course, to any rights in them which may have been surrendered to the general Government . . . The soil she holds as trustee of a public trust for the benefit of the people; and she may, by her legislature, grant it to an individual; but she cannot grant the rights of the people to the use of the navigable waters flowing over it; these are inalienable." (*People v. Gold Run D & M Co.*, 66 Cal. 138, 151-152, 4 P. 1152, 1159 (1884).)

There is nothing unusual or unprecedented in a rule of state law that leaves public trust rights impressed on grants to private parties. For example, South Dakota and North Dakota both have statutes similar to California's Civil Code section 830. In both states, these provisions were held, as in California, to give a fee interest to upland owners down to low-water. Nevertheless, it was held that the statutes did not extinguish public trust rights:

> "While the title of the riparian owner on navigable or public waters extends to ordinary low-water mark, still his title is not absolute, except to ordinary high-water mark, and as to the intervening shore space between high and low water mark the title of the riparian owner is qualified or limited by and subject to the rights of the public." (*Anderson v. Ray*, 37 S.D. 17, 24, 156 N.W. 591, 595 (1916). Accord, *Flisrand v.*

Madison, 35 S.D. 457, 152 N.W. 796 (1915); *Hillebrand v. Knapp,* 65 S.D. 414, 274 N.W. 821 (1937); *Sloan v. Biemiller,* 34 Ohio St. 492 (1878); *State v. Cleveland & Pittsburgh Railroad Co.,* 94 Ohio St. 61, 113 N.E. 677 (1916).)

In Montana, which has a similar statute, the rule is the same:

> "It is true that, while the abutting owner owns to the low water mark on navigable rivers, still the public have certain rights of navigation and fishery upon . . . the strip in question (between high and low water)." (*Gibson v. Kelly,* 15 Montana 417, 39 P. 517, 519 (1895).)

Other courts have also held that the trust attaches to lands between high and low-water when the sovereign bed extends only to low-water. (See, e.g., *Nedtweg v. Wallace,* 237 Mich. 14, 208 N.W. 51 (1926), affd. on rehearing, 211 N.W. 647 (1927); *Illinois Steel Co. v. Bilot,* 109 Wis. 418, 85 N.W. 402 (1901); *Miller v. Lutheran Conference and Camp Association,* 331 Pa. 241, 200 A. 646 (1938); *Attorney General v. Revere Copper,* 152 Mass. 444, 25 N.E. 605 (1890).)

B. A Riparian Boundary Is Ambulatory. State Law Controls The Effects Of Accretion, Erosion, Reliction, And Submergence

The boundary between public and private interests on navigable waters is an ambulatory one, determined by state law. (*Hardin v. Jordan,* 140 U.S. 371, 382 (1891).) State law controls the nature of the fee acquired by upland owners, whether increased or diminished by the processes of accretion, erosion, reliction, avulsion or, as here, submergence. The title to land acquired by accretion or its counterpart, submergence, has long been held to be " . . . a title acquired under operation of the law of the State, which each State determines for itself." (*St. Louis v. Rutz,* 138

U.S. 226, 250 (1891); *Barney v. Keokuk,* 94 U.S. 324, 337 (1896).)

The owner of lakefront land, like the holder of a beach house (cf. *Matcha v. Mattox,* 711 S.W.2d 95 (Texas 1986) cert. den., 107 S.Ct. 1911 (1987)), may suffer from the effects of erosion or submergence, whether natural or artificial, and may benefit from accretion. Under the common law there is no distinction as to whether changes in water boundaries were artificially or naturally caused. (*County of St. Clair v. Lovingston,* 90 U.S. (23 Wall) 46 (1874).)

Here, the courts chose to apply these common law principles, and fix the high and low water marks at the actual, established levels of Lake Tahoe with which littoral owners have been living for many years.[3] (*Fogerty I, supra,* 29 Cal.3d at 247-249.) Its opinion is both well-founded in precedent and practical.

The petitioners' apparent contention that the States' sovereign boundaries on non-tidal waters extend to the ordinary high (or low) water mark of the waterway in its "last natural condition" has no support under traditional common law principles or under California's interpretation of the common law. Under common law, the general rule is that title to the land follows changes in the shoreline, regardless of whether those changes are naturally or artificially caused. (See *County of St. Clair v. Lovingston,*

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3. Indeed, when the artificial levels of the Lake were established in the 1930's, a higher level than the one in question was approved by a poll of property owners. (Defendants' Exh. II, CT 3150; 30 Ops.Cal.Atty.Gen. 262, 266.)

supra, 90 U.S. (23 Wall.) at 68.)[4] The courts also have long held, without reference to prescriptive rules governing upland boundary disputes, that long-established water levels give rise to property rights regardless of their cause. (*City of Los Angeles v. Aitken*, 10 Cal.App.2d 460 (1935); see also *Clement v. State Reclamation Board*, 35 Cal.2d 628 (1950); *Natural Soda Prod. Co. v. City of Los Angeles*, 23 Cal.2d 193 (1943), cert. den. 321 U.S. 793 (1944): *Chowchilla Farms, Inc. v. Martin*, 219 Cal. 1 (1933); *Wilbour v. Gallagher*, 462 P.2d 232 (Wn. 1969), cert. den. 450 U.S. 878 (1970); *Diana Shooting Club v. Lamoreaux*, 114 Wis. 44, 89 N.W. 880 (1902).)[5]

The prescriptive rationale further supports this. Thus the state's boundary continues to move landward when water levels rise as a result of a dam or like condition, causing "artificial submergence." In opinions characterized by petitioners as "one old case from Arkansas and

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4. There are a few exceptions to this general rule, none of which are applicable here. Under common law, the boundary does not shift where there has been a sudden and perceptible "avulsion" or, analogously, where a lakebed has been uncovered by intentional drainage, reclamation or diversions. (E.g., F. Clark, *The Law of Surveying and Boundaries*, § 572 (4th ed. 1976); Tiffany, *Law of Real Property*, § 1222 at 1083 (3d ed. 1939).) The state court's determination that these rules did not apply to this situation is conclusive here.

In addition, California Civil Code section 1014 limits an upland owner's right to accretions to those caused by natural forces only. (*Carpenter v. City of Santa Monica*, 63 Cal.App.2d 772, 787-788, 147 P.2d 964, 971-973 (1944).) Section 1014 is inapplicable here because the artificial raising of Lake Tahoe by means of a dam has resulted in submergence of upland—not an accretion. Again, the state court's interpretation of the meaning of California law is conclusive in this Court.

5. A federal appellate court recently applied this rule to hold the Corps of Engineers had acquired jurisdiction over the artificially submerged portions of Lake Pend Oreille. (*Swanson v. United States*, 789 F.2d 1368 (9th Cir. 1986).)

another from Iowa" (*Fogerty* petn., p. 14) the Arkansas and Iowa courts held that land submerged by the erection of a dam or levee system on a navigable lake becomes the property of the State, as "trustee for the public," by virtue of prescription. (*State v. Parker*, 200 S.W. 1014, 1015-1016 (Ark. 1917); *State v. Sorenson*, 271 N.W. 234, 238-239 (Iowa 1937); see also *Village of Pewaukee v. Savoy*, 79 N.W. 436, 437 (Wis. 1899); *Diana Shooting Club v. Lamoreaux, supra*, 89 N.W. at 884; Farnham, The Law of Waters and Water Rights, § 59, p. 272 (1904 ed.).) Petitioners' characterization of the considered opinions of the highest courts of these sovereign states does not do them justice. It does, however, recognize that is neither new nor novel to adopt a rule of property based on long-established water levels. Significantly, the *Parker* case revolved around a conflict over public trust uses—one between members of the public and members of The Five Lakes Outing Club, over use of some 1,000 acres inundated by a levee in 1905. Although the club retained ownership of the underlying bed of this lake, the court held that it could not exclude the public from the waters, because the state, as trustee for the public, had acquired title by prescription. (*Id.*, 200 S.W. at 1015.)[6]

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6. The *Parker* case similarly belies petitioners' contentions that prescriptive rights must arise only if the water levels are raised by the state. In *Parker*, the dam had been built by a local levee district, not the state. (*Ibid.*) California case law is directly consistent in this regard. In *Bohn v. Albertson*, 107 Cal.App.2d 738 (1951), Frank's Tract, formerly privately owned farmland, was inundated by a breach in a delta levee. Although the owner retained title to the bed, the court held that he had no power to exclude members of the public seeking entry by boat for public trust purposes—i.e., hunting and fishing. At most he retained power to reclaim the land within a reasonable time. (*Id.*, 107 Cal.App.2d at 749; see also *Forestier v. Johnson*,

(Continued on following page)

The Washington Supreme Court used much the same reasoning in *Wilbour v. Gallagher, supra,* 462 P.2d 232, cert. den. 400 U.S. 878. In that case, the court enjoined a fill placed on land periodically submerged by operation of a dam across the outlet of Lake Chelan. The land was held in fee by the defendants. Absent the raising of water levels by the dam, the defendants' land would have been permanently dry. The court ordered defendants to remove the fill since it obstructed navigation, then discussed the effect of the dam on the lake:

> " . . . where the waters of a navigable body are periodically raised and lowered by artificial means, the artificial fluctuations should be considered the same as a natural fluctuation with the rights of the public being the same in both situations. . . . " (*Id.*, 462 P.2d at 238.)

(Accord, *Goodrich v. McMillan,* 187 N.W. 368 (Mich. 1922) [dam owner acquired prescriptive right to overflow littoral lands and maintain lake level three feet above natural level]; *Hass v. McManus,* 126 N.W. 462 (Mich. 1910) [riparian owners have right to maintenance of existing dam-regulated levels]; *Smith v. Youmans,* 70 N.W. 1115 (Wis. 1897) [artificial outlet maintained for 20 years "became the natural outlet with all its legal incidents and consequences"; dam operators acquired prescriptive right to flood plaintiff's land to new high-water level]; *Village of Pewaukee v. Savoy, supra,* 79 N.W. 436.)

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supra, 164 Cal. 24 (public's right to fish, hunt over periodically submerged tidelands granted in fee to private owners); *Taggert v. Jaffrey,* 76 A. 123, 125 (N.H. 1910): "The stream had been changed in a manner to indicate that the alteration was permanent. There are prescriptive rights"; *State v. Malmquist,* 40 A.2d 534, 538 (Vt. 1945) (artificial, dam-established lake level "has become the natural level"; owner could not lower against objections of littoral landowners.)

Of course this theory works on behalf of upland landowners as well as the sovereign state. The appellate courts of this state have held a number of times the landowner may acquire a vested interest in a long-continued diversion of waters (*Clement v. State Reclamation Board, supra,* 35 Cal.2d 628; *Natural Soda Prod. Co. v. City of Los Angeles, supra,* 23 Cal.2d at 197; *Chowchilla Farms, Inc. v. Martin, supra,* 219 Cal. at 18) and may recover damages if the level of a lake is lowered against his long-established expectations. (*City of Los Angeles v. Aitken, supra,* 10 Cal.App.2d at 472, cited in *Fogerty I, supra,* 29 Cal.3d at 248, fn. 5.)

C. Petitioners Had Ample Remedies Under State Law For Any Rights Lost By The Raising Of Dam Levels

Littoral owners whose lands are affected by an artificial raising or lowering of waters have ample remedies under state law. (*City of Los Angeles v. Aitkin, supra,* 10 Cal.App.2d 460.) However, if they fail to assert them in a timely manner, both state and private owners may become entitled to rely on the established artificial levels. (*Natural Soda Products v. City of Los Angeles, supra,* 23 Cal.2d at 197; *Chowchilla Farms, Inc. v. Martin, supra,* 219 Cal. at 18, cited in *Fogerty I, supra,* 29 Cal.3d at 248.)[7]

As petitioner Tahoe Shorezone Representation concedes, the right to object to the elevated waters of the lake

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7. See also 43 Ops.Cal.Atty.Gen. 291, 298 (1964) pointing out that "an artificially caused change in the water line of a lake or stream may come to be regarded as permanent," although the opinion goes on to state:

> "[I]t is possible that the artificial change would not result in a boundary change . . . if further changes in the artificially influenced waters could be enjoined, the practical effect would be to change the boundaries." (*Id.,* at 298-299.)

and the corresponding public uses up to the elevation of 6229.1 has long since been lost (TSR petition, 18-19). The Attorney General's opinion cited by petitioner bears this out in discussing the effect of the Truckee River Decree on rights of the littoral owners:

> "In our opinion, the right to an injunction is also now barred, even assuming that the acts of the federal officials in flooding littoral lands through operation of the dam, without the United States first having acquired rights to do so by condemnation, could have been enjoined when the flooding first occurred [citations omitted]. Since the littoral landowners have failed for more than 40 years to obtain injunctive relief, the equitable doctrine of laches would seem to bar the granting of such relief now. Irrespective of the applicability of any statute of limitations on such an action, it is a familiar principle of equity that 'unless a litigant can show that he acted with reasonable diligence in the assertion of his equitable rights, a court of equity will turn a deaf ear to his plea.' (*Williams v. Stilwell* (1933), 217 Cal. 487, 490; *Gillons v. Shell Co. of California* (9th Cir. 1936), 86 F.2d 600, 609-619)." (30 Ops.Cal.Atty.Gen. 262, 272 (1957).)

The same reasoning obviously applies as between littoral landowners and the State of California.

Obviously, littoral owners whose lands are affected by an artificial raising or lowering of waters have ample remedies under state law. They may seek injunctive relief, or they may seek compensation. (*City of Los Angeles v. Aitken, supra,* 10 Cal.App.2d 460.) However, if they fail to do so in a timely manner, both state and private owners may become entitled to rely on the established artificial levels. (*Natural Soda Products Co. v. City of Los Angeles, supra,* 23 Cal. 2d at 197; *Chowchilla Farms, Inc. v. Martin, supra,* 219 Cal. at 18.)

The California court has accurately concluded, therefore, that the condition of the lake as it has existed since

the construction of a dam in 1870 should be utilized in determining the lake's high-water mark.[8]

2. THE ACQUISITION OF SOVEREIGN RIGHTS UNDER STATE LAW GOVERNING AMBULATORY WATER BOUNDARIES IS NOT RESTRICTED TO THE LOCATION OF THOSE BOUNDARIES IN 1850

Petitioners' contention that the trust cannot exist on lands to which the state did not acquire title at statehood fails to comprehend the concept that riparian boundaries are ambulatory in nature, and can rise or fall with water levels. Furthermore, this proposition was expressly disapproved as a matter of state law in *City of Los Angeles v. Venice Peninsula Properties,* 31 Cal.3d 288, 299, fn. 11 (1982). The subsequent reversal of that case by this Court on other grounds in *Summa Corp. v. California* ex rel. *State Lands Comm.,* 466 U.S. 198 (1983) did not affect that holding.

In fact, this Court in *Summa* recognized the nature and extent of the state's public trust doctrine and indicated that in circumstances where the 1851 federal validating act controlling the transfer in question was not applicable, as in the instant case, a different result would follow:

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8. The court pointed out in *Fogerty I* that adoption of this method of fixing boundaries will make clarification of both private and public rights considerably easier in a state where virtually all of the lakes and rivers have been artificially regulated since the nineteenth century. It is no rebuttal to this application of state law to contend, as do petitioners Fogerty et al., that a 1957 study purported to fix a natural high waterline. (Petn., pp. 3-4, n. 1.) That study did not in fact or even purport to fix or establish in any way a natural high-water line of Lake Tahoe. It was a comprehensive water supply study of the lake which included an estimate of what the levels might have been after 1900 in the absence of the dam constructed at the lake's outlet (TR 3367 et seq.). Moreover, even the petitioners did not urge the elevation they suggest here in the proceedings below.

"The Federal Government, of course, cannot dispose of a right possessed by the State under the equal-footing doctrine of the United States Constitution. *Pollard's Lessee v. Hagan,* 3 How. 212 (1845). Thus, an ordinary federal patent purporting to convey tidelands located within a State to a private individual is invalid, since the United States holds such tidelands only in trust for the State. *Borax, Ltd. v. Los Angeles,* 296 U.S. 10, 15-16 (1935). But the Court in *Borax* recognized that a different result would follow if the private lands had been patented under the 1851 Act. *Id.,* at 19. Patents confirmed under the authority of the 1851 Act were issued 'pursuant to the authority reserved to the United States to enable it to discharge its international duty with respect to land which, although tideland, had not passed to the State.' *Id.* at 21. See also *Oregon ex rel. State Land Board v. Corvallis Sand & Gravel Co.,* 429 U.S. 363, 375 (1977); *Knight v. United States Land Assn.,* 142 U.S. 161 (1891)." (466 U.S. at 205.)

Petitioners look to *Brewer-Elliott Oil and Gas Co. v. United States,* 260 U.S. 77 (1922) to support their position that the public trust easement cannot move up the lakeshore as the waters rise. (*Fogerty,* petn. at p. 15.) More to the point, this Court stated in the next sentence to that quoted by petitioners:

"It is true that, where the United States has not in any way provided otherwise, the ordinary incidents attaching to a title traced to a patent of the United States under the public land laws may be determined according to local rules; but this is subject to the qualification that the local rules do not impair the efficacy of the grant or the use and enjoyment of the property by the grantee. *Thus the right of the riparian owner under such grant may be limited by the law of the State either to high or low water mark or extended to the middle of the stream. Packer v. Bird,* 137 U.S. 661, 669." (*Brewer-Elliot Oil and Gas Co. v. United States, supra,* 260 U.S. at 88; emphasis added.)

A water boundary is an ambulatory boundary. Its movement, as between the state and private upland owners, is determined by state law, and has been ever since *Martin v. Waddell, supra,* 41 U.S. (16 Pet.) 367, if not before. It does not present a federal question. (E.g., *Matcha v. Mattox, supra,* 711 S.W.2d 95 (Texas, 1986), cert. den., 107 S.Ct. 1911.)

3. PETITIONERS, HAVING FAILED TO ALLEGE ANY DENIAL OF ECONOMIC USE OF THEIR PROPERTY, DO NOT RAISE A FEDERAL QUESTION COGNIZABLE BY THIS COURT.

Petitioners have urged that the existence of a public trust on privately held property between high and low-water imposes invalid restrictions on their use of such property. Assuming for purposes of argument, that a state court's declaration of common law can effect a taking,[9] their complaint fails to assert such a claim.

The possible exercise of the public trust on navigable waters is no more a taking than is the proper exercise of the navigational servitude. It is, " . . . not an invasion of any private property rights in the stream or the lands underlying it, for the damage sustained does not result from taking property from riparian owners within the meaning of the Fifth Amendment but from the lawful exercise of a power to which the interests of riparian owners have always been subject." (*United States v. Rands,* 389 U.S. 121, 123 (1967); accord *United States v. Cherokee Nation of Oklahoma,* 107 S.Ct. 1487, 94 L.Ed.2d 704 (1987).)

Setting public trust considerations aside, the interest of a littoral owner between high and low-water is a quali-

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9. See *Gt. Northern Ry. v. Sunburst Co.,* 287 U.S. 358, 364-365 (1932); *Tidal Oil Co. v. Flanagan,* 263 U.S. 444, 450 (1924).

fied one to say the least. It is subject both to state and federal navigational servitudes to high-water. (See *City of Berkeley v. Superior Court, supra,* 26 Cal.3d at 545, cert. den. 449 U.S. 840; *Colberg v. State of California, supra,* 67 Cal.2d 408, 416, cert. den. 390 U.S. 949; *United States v. Cherokee Nation of Oklahoma, supra,* 107 S.Ct. 1487; *United States v. Rands, supra,* 389 U.S. 121, 123; *United States v. Willow River Co.,* 324 U.S. 499, 509 (1944); see also *Zabel v. Tabb,* 430 F.2d 199 (5th Cir. 1970).)[10] Moreover, consistent with the California rule, the federal navigational servitude extends to the artificially-raised high-water mark.[11] (*Swanson v. United States, supra,* 789 F.2d 1368.) And at Lake Tahoe the littoral interest is subject to periodic inundation up to an elevation above that set by the California Court of Appeal whenever the federally-appointed watermaster deems it appropriate. (See *Fogerty II, supra,* 187 Cal.App.3d at 224, 231, 235; see also 30 Ops.Cal.Atty.Gen. 262 (1957).)

The existence of a public trust on such lands does not deprive petitioners of economic use of the lands between high and low-water. Upland owners have taken a fee subject to the retained public trust interest. The purchaser of lands subject to the public trust ". . . may use the prop-

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10. The New Jersey Supreme Court has held that even privately owned dry sand beaches controlled by a quasi-public entity are subject to public right of access as reasonably necessary. (*Matthews v. Bay Head Imp. Assn.,* 471 A.2d 355 (N.J. 1984), cert. den. 469 U.S. 821.)

11. A federal district court recently affirmed applicability of the Corps of Engineers' jurisdiction over artificially-created wetlands under the Clean Water Act, as well, holding such lands could be "navigable waters of the United States." (*United States v. Akers,* 651 F.Supp. 320 (E.D. Cal. 1987).)

erty as he sees fit, subject to the power of the state to abate any nuisance he may create thereon, and to remove any purpresture he may erect thereon." Furthermore, where improvements have been constructed on such lands the state may not exercise the trust without compensating the patentee. (*People v. California Fish Co., supra,* 166 Cal. at 599.)

Uses consistent with the public trust have been held, under prior decisions of the California courts, to include clearly economic and valuable ones, including mineral exploration (*Boone v. Kingsbury, supra,* 206 Cal. at 181-184) and the construction of docks, wharves, motels, restaurants, shopping complexes and parking areas. (*Martin v. Smith, supra,* 184 Cal.App.2d 571.) Waterfront docks, resorts and buildings line the shores of San Francisco Bay, Los Angeles and San Diego harbors in mute reproach to petitioners' dismal characterization of trust restraints. Petitioners have been unable to cite a single instance in which littoral landowners have been denied use of trust land held by them in fee, nor have they found an instance in which the state has exercised the trust and re-entered for the purpose of furthering the trust.[12]

Petitioners cannot be heard to complain of being precluded from activities in which they have not even attempted to engage. They are entirely free to pursue their reasonable investment expectations by developing plans and going through the same processes any other landowners must pursue. Indeed, the existence of the public

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12. Even if it did so, of course, it would be required to compensate the owner for any lawful improvements. (*Illinois Central Railroad Co. v. Illinois, supra,* 146 U.S. at 455; *People v. California Fish Co., supra,* 166 Cal. at 599; California Public Resources Code section 6312.)

trust, while possibly inhibitive of fill or the construction of incompatible improvements, does not, absent an implementing statute or ordinance, even require petitioners to obtain the affirmative approval of anyone. (*Lyon, supra,* 29 Cal.3d at 232; *Fogerty I, supra,* 29 Cal.3d at 249.)

Indeed, before reaching some hypothetical public trust barrier, would-be developers of Lake Tahoe's shoreline must first seek the approvals of the U.S. Army Corps of Engineers and the regional and local planning agencies. The record indicates that the applicable land use regulations of these agencies would not permit any development in the shorezone (to an elevation above the high water mark in question) except for piers and other navigational facilities which are also deemed consistent with the public trust (TR 2708, 2719 et seq.; 2740 et seq.; 3030 et seq.; 3148).

Thus, petitioners' allegations that the mere existence of the public trust along the shores of Lake Tahoe below the high-water mark amounts to an unconstitutional taking is unsupported by any facts. They do not present this Court with a basis to judge whether their interests have been adversely affected, reasonably or not. Clearly such bald allegations are not ripe for consideration. (See *MacDonald Sommer & Frates v. Yolo County, supra,* 106 S.Ct. 2561; *Williamson County Regional Planning Commission v. Hamilton Bank, supra,* 473 U.S. 172.)[13]

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13. The question of the appropriateness of the damages remedy for regulations which deny a landowner all use of his land as recently considered and explained by this Court in *First English Evangelical Lutheran Church of Glendale v. County of Los Angeles, supra,* 107 S.Ct. 2378, has not been, and cannot be, raised in this case. Nor would it be appropriate in any

(Continued on following page)

This case was not ripe for review when petitioners asked this court to review *Fogerty I* in 1981 (cert. den., 454 U.S. 865). It is no more ready now that an intermediate appellate court has determined the location of Lake Tahoe's high-water mark at its current level. (See *Ariyoshi v. Robinson, supra,* 106 S.Ct. 3269.)

CONCLUSION

In 1893 this Court observed that the states are free to adopt their own rules of property, and that generalizations should be undertaken with great caution. (*Shively v. Bowlby, supra,* 152 U.S. at 26.)

As then-Justice Rehnquist stated in *Oregon* ex rel. *State Land Board v. Corvallis Sand & Gravel Co., supra,* 429 U.S. 363:

> "Under our federal system, property ownership is not governed by a general federal law, but rather by the laws of the several States. 'The great body of law in this country which controls acquisition, transmission, and transfer of property, and defines the rights of its owners in relation to the state or to private parties, is found in the statutes and decisions of the state.' *Davies Warehouse v. Bowles,* 321 U.S. 144, 155 (1944). This is particularly true with respect to real property, for even when federal common law was in its heyday under the teachings of *Swift v. Tyson,* 16 Pet. 1 (1842), an exception was carved out for the local law of real property. *Id.,* at 18. See *United States v. Little Lake Misere Land Co.,* 412 U.S. 580, 591 (1973).

(Continued from previous page)

event absent any showing of state implementation of the challenged decision which denied petitioners "all use" of their property. (*Id.,* at 2388-2389.)

"This principle applies to the banks and shores of waterways, and we have consistently so held." (*Id.*, at 378-379.)

Long ago, this Court wisely held that:

"[I]t is for the state court in cases such as this to define rights in land located within the state, and the Fourteenth Amendment, in the absence of an attempt to forestall our review of the constitutional question, affords no protection to supposed rights of property which the state courts determined to be nonexistent." (*Fox River Co. v. R.R. Comm.*, 274 U.S. 651, 657 (1927).)

For these reasons, the petitions for a writ of certiorari should be denied.

DATED: July, 1987.

Respectfully submitted,

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No. 86-1877 (4)

In the Supreme Court
OF THE
United States

OCTOBER TERM, 1986

CHARLES F. FOGERTY, et al.,
Petitioners,

VS.

STATE OF CALIFORNIA, et al.,
Respondents.

On Petition for a Writ of Certiorari to the Court Of Appeal of the State of California for the Third Judicial District

REPLY BRIEF OF PETITIONERS

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REPLY BRIEF OF PETITIONERS

In a not unfamiliar tactic for a respondent opposing certiorari, the State has done its best to muddy the waters, warning the Court away from the case by invoking the picture of a "swamp" (Br. in Opp. at 10)—inappropriately, one may think, when the setting is Lake Tahoe, a "unique mountain lake," "famed for its scenic beauty and pristine clarity." *Lake County Estates v. Tahoe Planning Agency,* 440 U.S. 391, 393 and n.2 (1979). The attempt ought not succeed: whatever else can be said about this controversy, the factual background is in no sense unsettled, confused, or incomplete, and the legal issues are equally uncomplicated. The burden of the present reply brief will be to seek to make clear once again what has been rendered murky. We first stress the immediate practical consequences of the decision below; then we briefly rebut the suggestion that no substantial legal issue is presented, or at least no question of federal law.

ARGUMENT

A. Valuable Property Interests are Immediately at Stake

1. Petitioners' opposition would have the Court believe that hardly anything of substance has yet been decided and that we should patiently wait and see whether the state court rulings have any bite when applied to the particular properties owned by petitioners. The State seems to be saying that the rejection of its *fee title* claim to the shorezone of navigable freshwater lakes—in favor of a mere "public trust" easement—has deflated the dispute to a level below the notice of a constitutional court. *See* Br. in Opp. at 2, 3-6, 7-9. What is more, the State's argument continues, the actual exercise of this easement is wholly conjectural, only "potential" (*id.* at 7), it being as yet undetermined "whether and how the public trust will be applied" (*id.* at 9), given that "[n]o actions for injunctive relief have been brought by the Attorney General, or anyone else" (*id.* at 6). Finally, even if implemented, it is said the public trust interest "may be curtailed or adapted to dovetail with private needs (and even wants)" (*id.* at 7), there being "many uses compatible with the trust interest" (*id.* at 5). Accordingly, the State concludes, "petitioners have not been harmed" and may never be (*id.* at 9).

To put the matter politely, this is disingenuous. It is not credible that a decade of litigation through all the California courts, with two applications to this Court, was much ado about nothing. Nor can we ignore the State's substantial incentive for invoking the public trust doctrine as applied to lands alienated long ago: to recapture private property for public use without payment of the compensation that surely would be due if the interest were straightforwardly condemned or sought to be appropriated by new regulations. *See Nollan v. California Coastal Commission,* No. 86-133, slip op. at 5-6 (June 28, 1987). As counsel of record for California more candidly wrote elsewhere, the theory of the public trust doctrine is that, when the State granted into private ownership the lands permanently or periodically covered by navigable waters, the grantees—albeit told nothing at the time—only "received bare title, with the public trust lingering over the land like the smile of a juridical Cheshire cat." J. Stevens, "The Public Trust: A Sovereign's Ancient Prerogative

Becomes the People's Environmental Right," 14 U.C.D. L. Rev. 195, 215 (1980). The truth is that the imposition of the public trust easement on the shorezone critically devalues the owner's title, reducing it to a naked fee. Indeed, this Court has expressly so held, characterizing the easement as "substantially in derogation of the fee interest," "expansive," and "of substantial magnitude," giving "the State . . . an overriding power to enter upon the property and possess it, to make physical changes in the property, and to control how the property is used," leaving to the landowner "little more than the naked fee." *Summa Corp. v. California ex rel. State Lands Commission,* 466 U.S. 198, 202 n.1, 205, 209 (1984).

2. It is beside the point that no express injunction has been issued against petitioners to restrain any specific use of their shorezone. Once recognized, the public trust servitude immediately confines the landowner's rights—and destroys the marketability of the portion of his property encumbered by the servitude. Henceforth, if he is to respect the law without waiting to be enjoined to do so, he may not develop his trust property for residential or agricultural or commercial purposes; instead, until otherwise directed, he must preserve it unimproved; and he must permit all the public to use it at will for boating, swimming, or fishing when covered with water; and for picnicking, hunting, hiking, birdwatching or nature study when dry. *See* Pet. App. at A-25 to A-26, A-58 to A-60. *See also* Pet. App. at A-8, A-66 to A-67, A-69. Unless the interest was reserved at conveyance, to impress such a servitude on private property undoubtedly amounts to a "taking" for which compensation must be paid. Indeed, the burden imposed here is greater than the relatively limited public right of navigation involved in *Kaiser-Aetna v. United States,* 444 U.S. 164 (1979), or the right of passage considered in *Nollan.*

To be sure, it is theoretically possible that neither the State nor any citizen would invoke the courts to compel petitioners to respect the public trust easement if they were to flout the law as now declared by California's highest court, or that substantial time would pass before such an action were initiated. So, also, it conceivably could happen that, although the owner scrupulously

respected the dominant servitude by eschewing all development and removing any fences, no member of the public took advantage of his rights and the State itself forsook appropriating the property to any public trust uses. There is every reason to think these are most unlikely scenarios. But, at all events, it is quite clear that we need not wait and see whether such inactivity ensues before deciding whether a "taking" has occurred.

As of now, petitioners have lost control of their properties, including the right to exclude others. No more here than in *Kaiser-Aetna* or *Nollan* is it necessary to know how many outsiders will enter, how often they will come, and how inconvenient to the owner their presence will prove. If California had prevailed in recapturing the whole fee of the shorezone, no one would have suggested that whether a "taking" occurred depended upon the future intentions of the State or the public, or the past intentions of the landowner. A different approach is not warranted because the interest appropriated is nominally an easement. Here, also, the question must be judged objectively, without regard to subjective values or damages peculiar to the proprietor, just as is the case when fixing the *amount* of compensation due. See *United States v. 50 Acres of Land,* 469 U.S. 24, 35-36 (1984); *(United States v. 565.54 Acres of Land,* 441 U.S. 506, 510-512, 514-515 (1979).

3. In sum, our Petition correctly stated that, in this case, "the physical extent and the legal intensity of the burden have been fully defined." Pet. at 16. It remains only to stress also, as we there said (*ibid.*), that "all avenues of relief (short of this Court) have been firmly shut," and that there is, accordingly, no question of lack of "finality" or "ripeness" here. We take up the matter again only because several passages of California's opposition, although slippery to the grasp, state or imply that the decision sought to be reviewed is not "final" or that, at all events, further judicial proceedings are contemplated which will more specifically define the scope of the easement impressed on petitioners' lands. *See* Br. in Opp. at 1, 5, 6, 7-9, 25-27.

It is grossly deceptive to speak of a decision by the California courts to "bifurcate the inquiry over the public trust interest in the Lake Tahoe shorezone." Br. in Opp. at 9. The fact is that, unless

this Court requires it, *no further judicial proceedings of any kind* are contemplated in these cases. It is now finally determined that petitioners' shorezone lands, with boundaries exactly defined, are impressed with a public trust easement and, as this Court itself has noted, the consequences of that ruling are not in doubt in light of prior decisions of the California Supreme Court. *See* p. 3, *supra*. If the judgment below stands, members of the public need no additional declaration to exercise their right to come onto the land of any one of the petitioners, up to the artificial high mark, for any or all of the purposes already listed (p. 3, *supra*), and none of the owners can lawfully exclude such visitors on the ground that a court has not yet issued a detailed injunction or declaration particularizing the public rights appertaining to this property.

Of course, new cases may arise if the State, the landowners, or a member of the public, wish to challenge actions or administrative decisions taken in the future. But there is no such thing as a variance or exemption from the public trust, since, by definition, the interest is inalienable and may be asserted by the public *against* State authorities inclined to waive it. *See Summa Corp.*, 466 U.S. at 205. The litigation that might eventuate in respect to these properties is akin to a landowner's suit in trespass or an action by the holder of a right of way to enjoin an obstruction to the exercise of his easement. Such proceedings may occur in connection with any land interest and the prospect that they will, or will not, happen here has no bearing on the finality of the present judgment or the ripeness of the questions now tendered.

4. It is equally clear that there is no prospect of obtaining monetary compensation through the state courts. Consistent with its holding that the public trust easement had been reserved *sub silentio* before any conveyance of the land, the California Supreme Court expressly rejected the claim that its decision works a "taking." Pet. App. at A-61 to A-63. On remand, the trial court unambiguously denied that the federal Just Compensation Clause was transgressed (Pet. App. at A-20), and, in that respect, the judgment of the superior court has been affirmed. *See* Pet. App. at A-5 to A-6 n.3, A-7 n.5, A-17, A-76. What is more, as this Court well knows, California steadfastly refuses monetary compensation for a regulatory "taking." *See MacDonald, Sommer and Frates v.*

County of Yolo, No. 84-2015, slip op. at 4-5 (June 25, 1986). While denial of payment for the *interim* period before the regulation is withdrawn has been held unconstitutional (*First Lutheran Church v. County of Los Angeles,* No. 85-1199, slip op. (June 9, 1987)), no such claim is advanced here and California remains free to prefer invalidation of a regulation that amounts to a taking. *See First Lutheran Church,* slip op. at 15; *Nollan,* slip op. at 15-16. The upshot is that the state system offers no relief and that the "taking" claim is fully ripe for consideration by this Court.

5. We have shown what is at stake for the petitioners here and now. But they do not stand alone. The California Supreme Court was at pains to stress the "vast importance" of the issues "to the general public as well as to the owners of the land bordering upon navigable lakes and streams" (Pet. App. at A-37 to A-38), noting that its decision would affect rights "in 4,000 miles of shoreline along 34 navigable lakes and 31 navigable rivers, and many thousands of acres of land between high and low water" (Pet. App. at A-24). Nor is the basic question presented confined to California. In one of the decisions below, it was asserted that a like result obtains in Minnesota and South Dakota. Pet. App. at A-57, A-63. California now claims several other States in support. Br. in Opp. at 13-14. However that may be, it *is* true that the issue potentially arises in a great many states—a substantial majority—which concede to the riparian proprietor the shorezone (and sometimes the entire bed) of at least some non-tidal navigable waterbodies. *See* No. 86-1901, Pet. App. at A-94 to A-99. Given the increasingly conflicting pressures on local governments to do more with less, it would not be surprising to see California's example widely imitated if this Court stands aside. The question urgently calls for resolution.

B. Substantial Federal Questions are Now Presented

1. Matching his declared uncertainty about the burdens resulting from attaching a public trust easement to littoral lands, California's Attorney General purports not to understand what question of *federal law* is presented. He stresses that, at statehood, the equal footing principle confirmed to California title to the beds of all navigable waters *to the high water mark* and that,

thereafter, the State was free to retain, alienate, or divide its interest in the shorezone. Br. in Opp. at 10-14. This is, of course, entirely true—as we expressly noted in our petition (at 12). But our claim is that, once a state unconditionally cedes all its title to the shorezone—as California did more than a century ago in the case of non-tidal waters—the attempt to recapture that interest, or a substantial part of it, without payment, runs up against the federal constitutional rule prohibiting governments from taking "private property . . . for public use without just compensation." That principle applies to all land now in private hands—whether title is derived from the state, from the United States, or from a prior sovereign—and the equal footing doctrine is wholly irrelevant. Nor does this Court's decision in *Oregon ex rel. State Land Board v. Corvallis Sand & Gravel Co.*, 429 U.S. 363 (1977), remotely affect the proposition.

2. Since California does not challenge our submission that a state court may no more work a taking without payment than the legislative or executive branches (Br. in Opp. at 7), the only issue on this aspect of the case is whether the present decision of the California courts in fact establishes a new rule of property law, unknown to petitioners and their predecessors when they acquired their lake-front lands in the last century. As to that, we read the California Supreme Court as effectively conceding that no prior California judicial decision, legislative declaration, or administrative ruling had so much as whispered the idea that a public trust easement (as opposed to a simple right of navigation) *attached above the low water mark* of *non-tidal* waterbodies at any season, much less when the shorezone is uncovered. *See* Pet. App. at A-24 to A-28, A-53 to A-63. *See also* Pet. at 11 and n.7. Respondents' present suggestion to the contrary simply does not bear scrutiny. *See* Br. in Opp. at 12-13. *Compare* Pet. App. at A-64 to A-65, A-71 to A-73; Note, "Lyon and Fogerty: Unprecedented Extensions of the Public Trust," 70 U.C.D. L. Rev. 1138 (1982); Comment, "The Public Trust After Lyon and Fogerty: Private Interests and Public Expectations—A New Balance," 16 U.C.D. L. Rev. 631, 635-636, 640, 654 (1983).

3. We are far from sure how to understand the State's response to the second question presented—focusing on the

lakeshore area between the natural high water line and the higher level resulting from the operation of the outlet dam. Our point here was (and is) that an unconstitutional taking results from California's extension of its public trust easement to this zone, an area never in State ownership and previously disclaimed by the Attorney General. We are now treated to a lecture on the ambulatory character of water boundaries (Br. in Opp. at 14-16, 21-23), interrupted by a very questionable digression chiding petitioners for missing their opportunity to obtain relief under State law (*id.* at 19-20). None of this is consistent with the decision below (Pet. App. at A-9 to A-12) and probably would produce a different line. But the new arguments do not, in any event, meet our complaint. Given the California Supreme Court's concession that no California precedent exists (Pet. App. at A-29) and the Attorney General's explicit statement in prior opinions that private rights were unaffected by artificially raised lake levels, the question remains whether the Just Compensation Clause condones the present declaration of a new rule of property, depriving petitioners of substantial land interests without tender of any payment. This is an issue of federal law that cannot be avoided by reference to this State's control over its navigable waters.

CONCLUSION

For the reasons stated here and in the petition, a writ of certiorari should be granted to review the decision of the California court of appeal.

Respectfully submitted,

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Nos. 86-1877 & 86-1901

In The

Supreme Court of the United States

October Term, 1986

CHARLES F. FOGERTY, *et al.*,
Petitioners,

v.

STATE OF CALIFORNIA, *et al.*,
Respondents.

TAHOE SHOREZONE REPRESENTATION,
Petitioner,

v.

STATE OF CALIFORNIA, *et al.*,
Respondents.

On Petitions for a Writ of Certiorari to the Court of Appeal of the State of California for the Third Appellate District

BRIEF OF AMICUS CURIAE, PACIFIC LEGAL FOUNDATION, IN SUPPORT OF THE PETITIONS FOR WRIT OF CERTIORARI

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INTEREST OF AMICUS CURIAE

Pursuant to Supreme Court Rule No. 36, Pacific Legal Foundation (PLF) respectfully submits this brief amicus curiae in support of the petitioners, Charles F. Fogerty, *et al.*, and Tahoe Shorezone Representation. Written consent to the filing of this brief has been granted by counsel for all parties. Copies have been lodged with the clerk.

PLF is a nonprofit, tax-exempt corporation organized under the laws of the State of California for the purpose of engaging in litigation in matters affecting the public interest. Policy is set by a Board of Trustees composed of concerned citizens, the majority of whom are attorneys. The PLF Board evaluates the merits of any contemplated legal action and authorizes such legal action only where the Foundation's position has broad support within the general community. The PLF Board has authorized the filing of an amicus curiae brief in this matter.

Amicus seeks here to augment the argument in the Petitions for Writ of Certiorari. It is believed that PLF's public policy perspective and litigation experience in support of private property rights will provide an additional viewpoint with respect to the constitutional issues presented. PLF has participated in numerous cases involving issues arising under the Takings and Due Process Clauses of the Fifth and Fourteenth Amendments to the United States Constitution.

On March 30, 1987, PLF argued the case of *Nollan v. California Coastal Commission,* No. 86-133, *juris. noted,* October 20, 1986. As in *Nollan,* this case reveals once again the incessant effort by the State of California to extend a public right of access and use over private waterfront property. *Nollan* involved an attempt to exact such property by a "required dedication" imposed as a condition to obtaining a building permit. Here the mechanism is the employment of an expansive "public trust" easement concept. The intended result, however, is the same—the acquisition of private property for public use without the payment of compensation. In the instant situation, however, no triggering action by the property owners was involved. No requests for development permits were

looked to for justification. Here, the result is simply accomplished by judicial fiat.

Amicus believes the opinion below poses a serious threat to the integrity of the individual right of property by violating constitutional prohibitions against the taking of property without compensation as well as due process guarantees. The result also violates fundamental notions of fairness and equity.

STATEMENT OF THE CASE

The opinion below[1] involves private property, much of it residential, fronting on Lake Tahoe. Historically, titles were derived from two separate sources which must be evaluated separately in terms of the legal issues presented.

First, there are those lands which were below natural high water mark at the time of California's admission to the Union on September 9, 1850. These were lands which the state, by virtue of its sovereignty, was entitled to either claim or not claim, as it might choose. California adopted the rule that lands fronting on navigable nontidal, *i.e.*, inland, waters extended to low water mark, a rule which since 1872 has been embraced in California Civil Code § 830. The California Supreme Court in *Lyon*, 29 Cal. 3d at 225, held that the effect of Section 830 was to

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[1] In referring to the opinion below, and the interim decisions leading up to the final judgment, this amicus will adopt the references used by petitioner, Tahoe Shorezone Representation. Thus, the interim opinion by the California Supreme Court in *State of California v. Superior Court (Fogerty)*, 29 Cal. 3d 240 (1981), will be referred to as *Fogerty I;* the companion case in *State of California v. Superior Court (Lyon)*, 29 Cal. 3d 210 (1981), will be referred to as *Lyon;* and the opinion of the Court of Appeal in *Fogerty v. State of California*, 187 Cal. App. 3d 224 (1986), will be referred to as *Fogerty II.*

grant to private persons "title to the beds of navigable bodies to low water mark."

Despite recognition that such lands were long ago conveyed into private ownership, the California Supreme Court in *Fogerty I* and *Lyon* resurrected a state claim by application of a "public trust" concept. The result is that the State of California, by the judgment below, has reasserted an interest so broad that for all practical purposes it swallows up the fee long since conveyed away. Under this approach, public rights between high and low water mark are not limited to navigational or water related uses. When water levels are low, it is declared that such lands, *even though dry,* nevertheless are open to public entry for nonwater related uses, including picnicking, hunting, and hiking. *Fogerty I,* 29 Cal. 3d at 245.[2] The doctrine also requires "preservation of the land in its natural state." *Fogerty II,* 187 Cal. App. 3d at 233.

Secondly, there are those lands upland of the natural high water mark—fast lands to which the state could never have asserted a claim by virtue of its sovereignty and which long ago were patented into private ownership by the federal government. The opinion below holds that even this type of land is subject to California's public trust doctrine if such land has been subject to periodic flooding due to the construction and operation of a dam by others. All that is required is the passage of time, and unsuspecting property owners will awaken one day to find that their land, during those times when it is not flooded, is nevertheless open to public entry for all the uses embraced by

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[2] In *Fogerty II,* 187 Cal. App. 3d at 234, this became picnicking, hunting, and *biking.* Although possibly a typographical error explains the reason for the change, it makes little difference—California's public trust doctrine is broad enough to embrace both hiking and biking.

California's public trust doctrine. Moreover, the owners' right to use their property, in a manner not inconsistent with any flowage easement acquired by the dam operator, will forever be severely restricted.

The dam at Lake Tahoe is operated by the federal government which controls the flow of water at the lake's only outlet into the Truckee River. The lake is used by the federal government as a reservoir. The dam gates can raise water levels only by about six feet. However, in many areas of gently sloping land, a considerable amount of property is periodically subject to flooding.

The opinion below held that the public right of use arose under a theory of prescription based upon the five consecutive years of *highest water,* backed up by the federal government's dam, since 1944. These were the years 1967 through 1971. *Fogerty II,* 187 Cal. App. 3d at 240. Public rights were thus extended to an elevation of 6228.75 feet above sea level. *Id.*

The effect of the judgment below has been to open these private uplands to the general public for use during those times when the lake's level retreats toward its natural level. Inasmuch as the federal government uses the lake as a reservoir, water levels are frequently below the highest levels achieved in 1967 through 1971.

Many of the properties affected are developed as residential homesites. Although homeowners undoubtedly consider boating and fishing a normal part of the scenery, one can readily understand the feelings of a homeowner facing a group of revelers pulling their boats onto the shore with the announced intention of picnicking in the front yard. The newly declared right of the public to enter private property for such purposes will not only

invade the property owners' privacy but will have obvious impacts on property values.

———o———

SUMMARY OF ARGUMENT

By the judgment below, California has abruptly reasserted its relinquished claim to lands lying between natural high and low water marks on Lake Tahoe. This was accomplished by concluding that, under concepts allegedly adopted by this Court in *Illinois Central Railroad Company v. Illinois*, 146 U.S. 387 (1892), the states were "powerless" to relinquish a "public trust" over such lands (*Lyon*, 29 Cal. 3d at 227)—a right which, as defined below, can only be viewed as the practical equivalent of a fee interest. Moreover, it must be assumed that federal lands, as well as private lands, are affected since the decision is premised on the basis of retained sovereign rights.

Serious questions of federal law are presented which should be reviewed by this Court. If California can do what it has done, every other state can do likewise. Property rights long since vested will be overturned. By opening these private lands to uses not embraced by original concepts of navigation, commerce, and fishing, the judgment below constitutes a radical, unforeseeable, and unanticipated extension of state authority. It is based on a perverse analysis of sovereign rights under the equal-footing doctrine and the effect is to deprive, in violation of the Due Process Clause of the Fourteenth Amendment, property owners of rights long since vested. And since the seizure is for public use, the Takings Clause of the Fifth Amendment, incorporated in the Fourteenth Amendment, is also invoked.

As for the holding below that lands located *above the natural high water mark* are also open to California's

"public trust" uses, the *process* by which petitioners were deprived of their rights deserves additional scrutiny. Here, clearly, preexisting property rights have been extinguished without regard to whether the property owners had *notice*, or any means of *obtaining notice,* that their properties were slowly but surely being taken by the State of California for "public trust" uses by the seasonal overflow of their lands by the federal government. This fact alone demonstrates that petitioners have been deprived of property without due process of law.

ARGUMENT

I

THE IMPOSITION OF CALIFORNIA'S PUBLIC TRUST DOCTRINE TO LANDS BETWEEN THE HIGH AND LOW WATER MARKS AT LAKE TAHOE HAS EFFECTIVELY TAKEN THESE LANDS FOR PUBLIC USE WITHOUT THE PAYMENT OF COMPENSATION

In *Barney v. City of Keokuk,* 94 U.S. 324 (1877), this Court concluded that the states were free to determine for themselves the boundaries of private lands fronting on inland navigable waters. The states were thus free to relinquish any claim below high water mark, subject only to the paramount right of navigation over the waters. This Court has consistently adhered to this view. *See Hardin v. Jordan,* 140 U.S. 371, 382-83 (1891); *Oregon ex rel. State Land Board v. Corvallis Sand and Gravel Company,* 429 U.S. 363, 374-75 (1977). As observed in *Lyon,* 29 Cal. 3d at 216, the states exercised these options differently; some states claimed only to low water, some to high water, and others made no claim whatever. California, by statute, is a low water state. Cal. Civ. Code § 830.

The California Supreme Court in *Lyon,* however, relying upon the decision of this Court in *Illinois Central,* concluded that any such recognition of private ownership was revocable and that the states are "powerless" to relinquish their rights as public trustee. *Lyon,* 29 Cal. 3d at 227. Accordingly, under the banner of the public trust doctrine, supported, according to the California Supreme Court, by this Court's holding in *Illinois Central,* the states are free to reassert rights in previously granted lands—rights which are so broad that they are, as noted earlier, the functional equivalent of a fee interest.

Illinois Central does not sanction such a result. The concern in *Illinois Central* was with an attempted alienation of the *permanently submerged* bed of Lake Michigan, action which would inevitably interfere with the navigational servitude. This Court's express concern was with the right of the people to "enjoy the navigation of the waters, carry on commerce over them, and have liberty of fishing therein freed from the obstruction or interference of private parties." *Illinois Central,* 146 U.S. at 452.

The problem with the reasoning below is that nothing in *Illinois Central* is inconsistent with the reasoning of *Barney v. Keokuk,* and the decisions of this Court which followed, holding that the states were free to relinquish all rights between high and low water marks save and except for those embraced by a *navigational* servitude. To say that *Illinois Central* authorizes a state 100 years later to reclaim the functional equivalent of a fee is to read into *Illinois Central* something which is simply not there. Moreover, any such conclusion, as a practical matter, renders the *Barney v. Keokuk* rule meaningless. Surely, it was not within the reasonable expectations of those who took title, or their successors, that such title could later be

revoked or reduced to a naked fee. The judgment below reads the law as playing a hoax on unsuspecting purchasers.

As stated by Justice Clark, dissenting in *Lyon*: "To impose the trust at this late date on all property within the shorezone so that the state may take it without payment is confiscation and constitutionally impermissible." *Lyon*, 29 Cal. 3d at 238.

See also Lyon v. Western Title Insurance Company, 178 Cal. App. 3d 1191 (1986), involving a subsequent unsuccessful claim against the title companies by affected property owners in *Lyon*. There the court agreed with a property owner's contention that *Lyon's* "innovative public trust doctrine . . . is bad law, unsupported by authority, violative of the separation of powers doctrine explicated by the state and federal Constitutions, and has taken his property for public use contrary to the state's Constitution." *Id.* at 1200.

It is submitted that the application of California's expanded public trust concept to lands above low water mark at Lake Tahoe constitutes a taking of private property without payment of compensation. The public is invited to enter. An owner's right of use is severely restricted. As observed by this Court in *Summa Corporation v. California, ex rel. State Lands Commission*, 466 U.S. 198, 205 (1984), an owner is left with little more than a "naked fee."[3]

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[3] In *National Audubon Society v. Superior Court*, 33 Cal. 3d 419, 440 n.22 (1983), the California Supreme Court, referring to *Fogerty I*, stated:

"By implication, however, the determination that the property was subject to the trust, despite its implication as to

(Continued on following page)

The fact that the taking has occurred as a consequence of a court decree, rather than by some administrative or legislative action, does not alter the result. This is not a case where the state court is adjudicating disputes between private parties.[4] This is a case where the state court has declared property open to *public use*. The Takings Clause of the Fifth Amendment, as incorporated into the Fourteenth Amendment, addresses the state *as an entity*. As stated in *Chicago, Burlington, & Quincy Railroad Co. v. City of Chicago*, 166 U.S. 226, 235 (1897):

> "If compensation for private property taken for public use is an essential element of due process of law as ordained by the 14th Amendment, then the final judgment of a state court, under the authority of which the property is in fact taken, is to be deemed the act of the state within the meaning of that Amendment."

The judicial taking issue is comprehensively and persuasively presented in the petitions. The arguments therein need not be repeated here.

(Continued from previous page)

future uses and improvements, was not considered a taking requiring compensation."

Compare this Court's analysis in *Kaiser Aetna v. United States*, 444 U.S. 164, 172-73 (1979), stating:

> "[T]his Court has never held that the navigational servitude creates a blanket exception to the Takings Clause whenever Congress exercises its Commerce Clause authority to promote navigation. Thus, while Kuapa Pond may be subject to regulation by the Corps of Engineers . . . it does not follow that the pond is also subject to a public right of access."

[4] *Cf. Corporation of the Presiding Bishop v. Hodel*, 637 F. Supp. 1398 (D.D.C. 1986).

II

THE EXTENSION OF THE PUBLIC TRUST DOCTRINE LANDWARD OF THE NATIONAL HIGH WATER MARK HAS ALSO VIOLATED PETITIONERS' CONSTITUTIONAL RIGHTS

A. The Finding of a Prescriptive Easement in Favor of the State, Based upon a Use by the Federal Government, Constitutes a Taking of Property for State Purposes Without Compensation

Referring to property above the natural high water mark and the effect thereon of the federal government's dam, the court below stated:

> "Lands were inundated which, before statehood, had belonged to the littoral owners free of the public trust." *Fogerty II,* 187 Cal. App. 3d at 230.

The court then held that the inundation by the federal government gave the state the right to impose its public trust easement on those lands. The legal theory was that adverse use by the federal government created prescriptive rights for different uses on behalf of the state. The result is an appropriation of property for state use based upon a theory of adverse use even though there was no adverse use by the state.

The adoption of such an arbitrary and unexpected rule of property law constitutes a judicial taking. *See, e.g., Hughes v. State of Washington,* 389 U.S. 290, 296-97 (1967) (Stewart, J., concurring). Petitioners have persuasively argued this point and further elaboration is not required here.

B. The Adoption of a Rule of Law Which Results in a Forfeiture Without Adequate Notice and Opportunity to Take Protective Action Deprives a Person of Property Without Due Process of Law

There can be no question but that the use of petitioners' properties by the federal government for water storage purposes involved the taking of an interest *by the federal government.* In 1957, the California Attorney General specifically found that the doctrine of laches as well as the applicable period of limitations precluded affected property owners at Lake Tahoe from pursuing a claim against the federal government. 30 Op. Att'y Gen. 262, 271-72 (1957). The opinion concluded that a taking had occurred "in the nature of a flowage easement, an easement for intermittent flooding." *Id.* at 271. There was no hint, however, that the rights of the property owners were otherwise affected.

Nevertheless, the court below concluded that the mere presence of water on private property, backed up by a government dam, will convert the ownership to public use solely as a consequence of the passage of time. Such a result cannot be permitted to stand.

The finding of an easement in favor of the public, based upon a use which does not impart knowledge of the nature and extent of the easement being claimed, is inequitable, confiscatory, and deprives the affected owners of their property without due process of law.

Such a rule also can only lead to unnecessary conflicts between the affected parties. The dilemma presented can be simply put: When the federal government builds a dam for water storage purposes, or raises waters behind an existing dam to new levels, must the affected

property owners pursue a claim against the federal government, the state government, or both, not just with respect to the occasional overflow (to which they may not object), but also for the loss that ultimately will result from the imposition of a public trust easement should they fail to take such action?

Applied prospectively, the rule adopted below is a trap for the unwary and stirs up litigation by those who may have learned of the novel rule and who thus appreciate the necessity of pursuing a claim against someone in order to preserve their property.

Applied retrospectively, to the property owners at Lake Tahoe, the result is outright confiscation.

The entire foundation of the concept underlying prescriptive easements is premised upon an adverse use *which imparts knowledge as to the nature and extent of the claim being made. See Restatement of Property* § 458, Comment to Clause (c) (1944), which states in part:

> "The requirement that, to be adverse, a use must be open and notorious is for the protection of those against whom it is claimed to be adverse. It enables them to protect themselves against the effect of the use by preventing its continuance."

The forfeiture of property rights as a consequence of adverse use is based upon a limitation of actions concept. A property owner who sits on his rights while his land is openly invaded by another ultimately loses his right to contest the entry. And the intruder will obtain a right to continue the intrusion.

Thus, in the early case of *Hawkins v. Barney's Lessee,* 30 U.S. (5 Pet.) 457 (1831), this Court recognized that where one party is actually making use of the property of

another, the other may, with the passage of time, lose his right to challenge the use. This Court said:

> "Such laws have frequently passed in review before this Court; and occasions have occurred in which they have been particularly noticed as laws not to be impeached on the ground of violating private right. What right has anyone to complain, when a reasonable time has been given him, if he has not been vigilant in asserting his rights?" *Id.* at 466.

A different result must, however, necessarily follow where a property owner is stripped of property where it has never been entered and occupied, where there has never been an adverse claim of the nature being asserted here, and thus where there has been no notice of such a claim being made.

In *Texaco, Inc. v. Short,* 454 U.S. 516 (1982), this Court reviewed an Indiana statute which provided that a severed mineral interest would be extinguished if unused for a period of 20 years unless the mineral owner filed a claim prior to the end of the 20 year period or within a 2 year grace period following enactment of the statute. The issue was whether the statute imparted adequate notice and opportunity to affected mineral owners to take effective action to protect their interests. In a five-to-four decision, the majority held that the Indiana law provided such adequate notice and opportunity. However, had it not been for the finding of adequate statutory notice and the two year grace period, there is little question but that the majority would have joined the dissent.

The dissent, authored by Justice Brennan, stated the issue in a manner that could be applied word for word to the instant situation by merely substituting the word "California" for the word "Indiana" and the word "petitioners" for the word "appellants":

> "The question presented here is simply whether the State of Indiana has deprived these appellants of due process of law by extinguishing their pre-existing property interest without regard to whether they knew, and without providing any meaningful mechanism by which they might have learned, of the imminent taking of their property or their obligations under the law." *Texaco, Inc.*, 454 U.S. at 540.

Justice Brennan went on to observe:

> "If Indiana were by simple fiat to 'extinguish' all pre-existing mineral interests in the State, or to transfer those interests to itself, to surface owners, or indeed to anyone at all, that action would surely be unconstitutional and unenforceable—at least absent just compensation." *Id.* at 542.

Finally, it was noted:

> "Property owners have historically been allowed to rest easy in the knowledge that their holding is secure, absent some affirmative indication to the contrary; to rely on the general practice that '[n]otice is required before property interests are disturbed.' " *Id.* at 547.

There is nothing in the majority opinion inconsistent with the views of Justice Brennan as to whether some kind of notice was required. The majority merely concluded that, under the Indiana law involved, adequate notice had been given. In the instant situation, however, *no notice was given.* Paraphrasing from Justice Brennan's analysis, as applied to the situation at Lake Tahoe, one can only conclude that "an average citizen would have no reason to regard the triggering event [*i.e.*, federal flooding] as calling for a heightened awareness of one's legal obligations [to protect against a future state claim permitting dry land intrusions]." *Id. See also Hodel v. Irving,* 55 U.S.L.W. 4653, 4657 (May 18, 1987) (Stevens, J., concurring).

The inequity at Lake Tahoe is even more pronounced, however, because only a few years before the alleged "prescriptive" period began to run, the California Attorney General in an opinion published at 43 Op. Att'y Gen. 291 (1964) expressly found that the boundaries of a nontidal navigable lake or river are "to be established according to its last natural elevation, *not affected by artificial influences, such as dams or locks.*" *Id.* at 297 (emphasis added). The opinion further emphasized that this rule has been adhered to "even though the artificial influences were dams and locks constructed by the Federal Government." *Id.*[5]

In short, the periodic overflow caused by the federal dam not only failed to give notice of a potential state claim, but the State of California, three years before the prescriptive period began, actually disavowed any such claim. It would be hard to find a clearer case involving lack of due process.

III

THIS CASE IS RIPE FOR REVIEW

Williamson County Regional Planning Commission v. Hamilton Bank of Johnson City, 473 U.S. 172 (1985), demonstrates that the petitions for certiorari filed in this Court after *Fogerty I* were premature. Further proceedings were contemplated. The judgment was not final. No

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[5] The opinion did recognize that riparian or littoral owners, who have made substantial expenditures on improvements in reliance on artificial changes caused by another, may be able to enjoin the other from altering the artificial condition. The theory is estoppel. But that rule has no application here. The opinion repeatedly stressed that this was a theory available to the riparian or littoral owner against the party making the change. The littoral owners here have not altered natural levels and there are no state improvements made in reliance on any littoral owner actions which would support a theory of estoppel against the owners.

determination had been made as to *how* the federal government's use of Lake Tahoe as a reservoir would affect the quantity of land to be claimed by the state.[6] As argued by the California Attorney General in its opposition to the earlier petitions, "issues respecting the location of high and low water lines remain to be tried on remand to the state trial court." Respondent's brief in opposition at 4. However, if the decision below is left standing, the judgment will be final and will have been *applied* to specifically identified property lying below an elevation of 6228.75 feet thus meeting the *Williamson* standard.

No further action by state officials will be required before the petitioner's property rights are defeated. California's public trust doctrine is self-actuating. Rights inure directly in the members of the public. *See Marks v. Whitney*, 6 Cal. 3d 251, 261 (1971), where it was held that members of the public may not be barred from asserting or exercising public trust rights on privately owned lands subject to the trust. As stated in *Summa Corporation*,

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[6] This was resolved in *Fogerty II*, 187 Cal. App. 3d at 239: "The need for water storage . . . fluctuates from season to season and ultimately from year to year. We believe it wholly unnecessary to the doctrine of prescription for water impounded behind a dam to remain in place continuously for the five-year period in order for prescriptive rights to attach. Practical experience tells us no reservoir operates that way. We believe, instead, that the needs of the reservoir operator are determinative. [Citation omitted.] Where the reservoir operator returns the waters to a zenith each water year and maintains the water at that elevation for the duration of his needs his use of the reservoir is 'continuous' up to and including that highest point. . . . For purposes of the public trust doctrine, we shall therefore set the high watermark of Lake Tahoe at the highest elevation actually reached by the 'current' lake in five sequential years."

466 U.S. at 205, the landowner is left with "little more than naked fee" because any private use "remains subject to the right of the State *or any member of the public* to assert the State's public trust easement." (Emphasis added.)

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CONCLUSION

At least two fundamental infirmities led up to the judgment below which resulted in a violation of petitioners' property rights guaranteed by the Takings and Due Process Clauses of the Fifth and Fourteenth Amendments.

The first is the assumption that this Court's holding in *Illinois Central* authorized the imposition of California's public trust concept to lands lying between the high and low water marks of inland navigable waters. The declaration below to this effect not only raises a serious question of federal law under the equal-footing doctrine but, if allowed to stand, will result in a taking of private property without compensation.

The second infirmity involves the holding below that periodic submergence of littoral lands due to the regulation of a dam by the federal government's watermaster during the years 1967 through 1971 has resulted in a prescriptive easement in favor of the state authorizing a wide variety of public uses. These include picnicking, hunting, and hiking. However, to reach such a result, in conformity with due process requirements, the court below also would have had to conclude that the periodic submergence somehow put the property owners on *notice* that these newly authorized activities could now take place on their properties during those times of the year when they are not submerged. The court also would have had to conclude

that the property owners sat on their rights, that they should then and there have sued the federal government and the State of California under some theory of action, and that, in failing to do so, they forfeited their rights under concepts of adverse use.

It is respectfully submitted that no such notice was generated and no such causes of action accrued. If allowed to stand, this holding will result in a taking without compensation. It additionally violates fundamental due process guarantees.

For the reasons stated above, it is respectfully requested that the petitions for certiorari be granted.

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Respectfully submitted,

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